Customs Bulletin and Decisions

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 JULY 31, 1996 NO. 31

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DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notices

19 CFR Part 134

USE OF "MADE IN" AND "ASSEMBLED IN" IN ONE COUNTRY OF ORIGIN MARKING STATEMENT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General marking exception.

SUMMARY: This document advises the public of a general country of origin marking exception that will be granted by Customs, commencing August 5, 1996, for three months for imported foreign articles which reach the ultimate purchaser in the United States containing a marking with the words "Made in," "Product of," or words of similar meaning, such as "Knit in," along with the use of "Assembled in" in a single country of origin marking statement.

EFFECTIVE DATES: August 5, 1996 through November 5, 1996.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Special Classification and Marking Branch, Office of Regulations and Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

Customs previously has determined that the use of "Made in," "Product of," or words of similar meaning, such as "Knit in" (when the country of origin was the country in which an article was knit to shape), along with the use of the words "Assembled in" in a single country of

origin marking statement, was acceptable for purposes of 19 U.S.C. 1304. These prior determinations were based upon Customs position that the words, "Assembled in" were not a country of origin marking indicator, except as provided for in 19 CFR 10.22 for articles eligible for subheading 9802.00.80, Harmonized Tariff Schedule of the United States (HTSUS), treatment. *See* Headquarters Ruling Letter (HRL) 087271 dated January 17, 1991, (the expressions "Made in China, Assembled in Hong Kong" or "Knit in China, Assembled in Hong Kong" were acceptable under 19 U.S.C. 1304 and 19 CFR 134.46 indicating that the country of origin of sweaters was China). *But see* HRL 733564 dated August 10, 1990 (the marking "Made in Canada" needed to be removed from hoses manufactured in Canada, after assembly with brass fittings in Mexico, as the country of origin of the assembled article was Mexico pursuant to 19 CFR 10.22 and the article could be marked "Assembled in Mexico").

Due to the confusion generated by 19 CFR 10.22 concerning when it is acceptable to use the words "Assembled in," in country of origin marking, this section, effective August 5, 1996, will be removed from the Customs Regulations as part of a final document which principally implemented Annex 311 of the North American Free Trade Agreement (T.D. 96–48, 61 FR 28932, 28955, June 6, 1996). That final rule document also included an amendment to 19 CFR 134.43(e) to provide for the use of the phrases, "Assembled in (country of final assembly)," "Assembled in (country of final assembly) from components of (name of country or countries of origin of all components)," or "Made in, or product of, (country of final assembly)," as methods of marking an imported article when the country of origin of such article is determined to be the country in which it was finally assembled.

Accordingly, for all goods entered, or withdrawn from warehouse, for consumption on or after August 5, 1996, the country of origin indicator, "Assembled in," may be used for the marking of imported articles only when the country of origin of that article is determined to be the country in which the article was finally assembled. Whether or not the article is eligible for entry under subheading 9802.00.80, HTSUS, will not be relevant to the use of this marking.

Furthermore, as a result of the amendment of 19 CFR 134.43(e), the terms "Made in" and "Assembled in" are always words of similar meaning, and it will no longer be acceptable to use "Made in," "Product of," or words of similar meaning, along with the words "Assembled in" in a single country of origin marking statement on articles of foreign origin imported into the United States.

However, the marking statute and regulations allow for exceptions to the marking requirements under certain circumstances. One of these exceptions concerns articles which cannot be marked prior to, or after, importation except at an expense that would be economically prohibitive. *See* 19 U.S.C. 1304(a)(3)(C) and (K), and 19 CFR 134.32(c) and (o).

In consideration of: (1) the fact that the use of "Made in," "Product of," or words of similar meaning, along with the use of the words "Assembled in" in a single country of origin marking statement has been acceptable until the amendment of 19 CFR 134.43(e), and many articles or labels containing such statements may have already been made; (2) the expectation that many individual requests will be received for marking exceptions on the ground of economic prohibitiveness; and (3) the importance of providing uniform Customs treatment, Headquarters has made a general finding under these circumstances that it would be economically prohibitive to require the marking of imported foreign articles (either before or after importation) in compliance with 19 CFR 134.43(e), as amended, as of the effective date of the new regulations. This general marking exception shall be granted for all imported foreign articles marked "Made in," "Product of," or words of similar meaning, such as "Knit in," along with the use of the words "Assembled in" in a single country of origin marking statement, for a period not to exceed three (3) months from the effective date of 19 CFR 134.43(e), as amended, (i.e., no later than November 5, 1996), which Customs views as a reasonable period of time for the exhaustion of existing inventory. Please note that, if information is obtained that the above articles or labels were made after August 5, 1996, this general marking exception will not apply.

Dated: July 11, 1996.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

[Published in the Fderal Register, July 19, 1996 (61 FR 37678)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 16, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO COUNTRY OF ORIGIN MARKING REQUIREMENTS FOR CERTAIN CORDLESS TELEPHONE SETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Modification of country of origin marking ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling which specifies country of origin marking requirements pertaining to cordless telephone sets. Notice of the proposed modification was published June 5, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 23.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after September 30, 1996.

FOR FURTHER INFORMATION CONTACT: David Cohen, Special Classification and Marking Branch, (202) 482–7076.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 5, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 23, proposing to modify Headquarters Ruling Letter (HRL) 559067, dated September 27, 1995, which concerned the country of origin marking requirements of cordless telephone sets. Two comments were received in response to this notice. In Headquarters Ruling Letter (HRL) 559067, dated September 27, 1995, Customs ruled that telephone components packed together as a set were not substantially transformed by virtue of being packaged as a unit for sale as a tele-

phone set. Consequently, it was held that the country of origin of each component must be identified on the retail container or on the articles themselves (i.e. the telephone line, the power cord, etc.). This office reviewed HRL 559067 in the context of a request for reconsideration and determined it was partially erroneous. Customs proposed to modify HRL 559067 to provide that the origin of the telephone line need not be separately identified in light of the "common-sense approach" to marking articulated in T.D. 91–7. However, the country of origin of the telephone power cord was required to be marked.

One commenter expressed its support for the "common-sense approach" adopted by Customs in making country of origin marking determinations and encouraged Customs to exempt from marking relatively insignificant components and accessories for electronics products when these items are packaged with the final good. The commenter suggested that a determination of the country of origin marking requirements applicable to sets should be based on the "essential character" of the set. Thus, in the example of the cordless telephone set, the commenter states that as the telephone itself imparts the essential character of the set, only the origin of the telephone should be required to be provided to the ultimate purchaser.

Customs disagrees with the above comment. There is nothing in 19 U.S.C. 1304 or the implementing Customs regulations which indicates that the classification of collections of articles under a single provision of the HTSUS using the principles set forth in the GRI's exempts the individual articles contained in such collections from the marking requirements under 19 U.S.C. 1304. Customs will continue to use the "common-sense approach" on a case-by-case basis to determine whether a particular article in a set must be separately marked with its country of origin.

The second commenter contends that the proposed partial modification of HRL 559067 does not implement the "common-sense approach" to marking to the extent that the telephone power cord is required to be marked. The commenter states that consumers purchase cordless telephones not because they are capable of recharging batteries, but because these telephones offer a broader range than conventional telephones which are constrained by telephone cords. However, the ability to convert electricity to stored power for the telephone headset's rechargeable battery so that it can send end receive signals from the base unit is one of the principal reasons this broader range of use is made possible. In addition, Customs recognizes that the telephone power cord also provides electricity to the cordless telephones base unit enabling it to carry out its role in the functioning of the unit.

While the telephone power cord may not be a unique article since it is capable of being a power source for a host of different electronics, its role in the operation of the cordless telephone at issue nevertheless is significant. The comments submitted in response to the proposal to modify HRL 559067 to permit no marking for the telephone line cord

but to require that the telephone power cord be marked with its country of origin have not persuaded Customs to alter the proposed ruling.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying HRL 559067, dated September 27, 1995 to reflect the proper country of origin marking requirements of cordless telephone sets. HRL 559453, modifying HRL 659067, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: July 16, 1996.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 16, 1996.
MAR-2-05 RR:TC:SM 559453 DEC

MR. J. KEVIN HORGAN
DEKIEFFER, DIBBLE & HORGAN
Suite 900
915 Fifteenth Street, N.W.
Washington, DC 20005

Re: Reconsideration of HRL 559067; country of origin marking of cordless telephone sets; request for marking exception; substantial transformation; HRL 734560; HRL 734363; T.D. 91-7; HRL 734505; HRL 734172; economically prohibitive.

DEAR MR. HORGAN:

This is in response to your letter dated September 27, 1995, on behalf of your client, Thomson Consumer Electronics, Incorporated (ICE), in which you request a delay in the effective date of Headquarters Ruling Letter (HRL) 559067, dated September 19, 1995, regarding the country of origin marking requirements for certain cordless telephone sets. In addition, this ruling letter is in response to your letter dated October 10, 1995, on behalf of TCE requesting Customs to review its decision In HRL 559067.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. § 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub L. 103–182, 107 Stat 2057, 2186 (1993) (hereinafter section 625), notice of the proposed modification of HRL 559067 was published on June 5, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 23.

Facts:

TCE imports cordless telephone sets produced in China, Malaysia, and the Philippines. You submitted samples of the two telephone units that were the subject of HRL 559067 in the boxes that will reach the ultimate purchaser in the United States. Model 2-9615 is a cordless telephone that includes an extra recharge cradle with a recharging cord incorporated into the cradle and Model 2-9635 is a cordless telephone which features a speaker

phone in the base unit. You provided the following information with respect to the cost, origin, and marking of each component as imported.

Component	Cost	Origin	Marking
Model 2–9615			
Base Unit	$10.614	Malaysia	Made in Malaysia
Handset	$12.084	Malaysia	None
Recharge Cradle	$01.451	Malaysia	Made in Malaysia
Power Cord	$01.520	China	Made in China
Telephone Line	$00.197	Malaysia	None
Manuals	$00.163	Malaysia	Printed in Malaysia
Packing	$00.513		Made in Malaysia
Total Cost	$26.542		
The suggested retail price for Model 2–9615 is $64.99			
Model 2–9635			
Base Unit	$20.938	Malaysia	Made in Malaysia
Handset	$12.724	Malaysia	None
Telephone Line	$00.185	Malaysia	None
Manuals	$00.202	Malaysia	Printed in Malaysia
Packing	$00.810		Made in Malaysia
Total Cost	$34.859		
The suggested retail price for Model 2–9635 is $89.99			

You stated that the power cords and the telephone lines may be sourced in one or more Asian countries, including Malaysia, China, the Philippines, Indonesia, Korea, Singapore, and Hong Kong. Each telephone set will be packaged in Malaysia prior to exportation in an individual box that will reach the retail customer marked "Made in Malaysia".

The operations performed to package the various components to form the telephone sets as described in HRL 559067 were found in that case to be extremely simple. Accordingly, Customs concluded that the gathering of the components and placing them in the cartons in Malaysia for retail sale would not result in a substantial transformation of the non-Malaysian components. The country of origin of each component was required to be identified.

Issues:

1. Will Customs grant a delayed effective date for HRL 559067 or an exception to marking on the basis that it would be economically prohibitive to require TCE to mark the telephones already imported in accordance with HRL 559067?
2. Will Customs modify HRL 559067 so that the imported cordless telephones described above may be legally marked "Made in Malaysia" without referring to the country of origin of any of the other components packaged in the retail container?

Law and Analysis:

Delayed Effective Date:

The Custom Service will from time to time issue a ruling letter covering a transaction or issue not previously the subject of a ruling letter and which has the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions of either the recipient of the ruling letter or other parties. In situations where a party has relied, not on a previously-issued ruling letter, but on past Customs treatment, Customs requires that the affected party submit an application requesting a delay in the effective date of a ruling letter. In these situations, 19 CFR 177.9(e)(2), sets forth specific requirements for such applications. According to this provision, the applicant must demonstrate to the satisfaction of the Customs Service that the treatment previously accorded relates to substantially identical transactions, and was sufficiently consistent and continuous that the party reasonably relied on the past treatment in the arrangement of future transactions.

Specifically, section 177.9(e)(2) requires that the applicant must submit evidence of past treatment by the Customs Service covering the 2-year period immediately prior to the date of the ruling letter, listing all substantially identical transactions by entry number. In addition, the applicant must provide the quantity and value of merchandise covered by each

such transaction, the ports of entry, and the dates of final action by the Customs Service. Section 177.9(e)(2) further notes that, "[t]he evidence of reliance shall include contracts, purchase orders, or other materials tending to establish that the future transactions were arranged based on the treatment previously accorded by the Customs Service." Finally, in order to grant a delay pursuant to 177.9(e)(1), the regulations require that Customs examine all relevant factors regarding the issue of reliance. Section 177.9(e)(3) requires that Customs carefully review the past transactions on which reliance is claimed to determine whether there was an examination of merchandise by Customs. Furthermore, in making the determination to delay, the weight accorded to the documented history of consistent and continuous Customs treatment, will be diminished in the following instances: transactions involving small quantities or values, informal entries, and situations where Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination and/or import specialist review. *See* 19 CFR 177.9(e)(3).

You submit that the previous treatment accorded by the Customs Service to substantially identical transactions involving cordless telephones was sufficiently consistent and continuous since 1986, so that TCE reasonably relied thereon in arranging future transactions and thus, you contend that TCE has satisfied its claim for detrimental reliance. You state that TCE has been importing and selling 3,149,000 G.E. brand telephone sets annually since 1986 and that the imported telephones have undergone numerous Customs examinations including country of origin marking examinations. Despite the fact that the transformer power supply cords were routinely marked with a country of origin that is different from the origin of the telephone set disclosed on the consumer packaging, you state that TCE was never advised that it was required to reference the origin of minor accessories on the outside consumer packaging.

We find that under the facts in this case, a claim for detrimental reliance has not been established. You have not demonstrated with the specificity that the regulations require that the past import transactions upon which reliance is claimed were examined for proper country of origin marking requirements. In addition, you did not offer evidence of a particular entry where Customs scrutinized and approved of the country of origin marking for cordless telephones that contain power cords and/or telephone lines marked with a country of origin different from the origin of the telephone set disclosed on the consumer packaging. Mere evidence of liquidation of an entry of cordless telephones is not sufficient to establish that the country of origin marking in the prior transaction was substantially identical to the subject entries. Therefore, a delay in the effective date of HRL 559067 is not warranted because insufficient evidence was submitted.

Country of Origin Marking:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that every article of foreign origin (or its container) imported into the United States shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit, in such manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Neither the statute nor Part 134 of the Customs Regulations contains any special requirements regarding the marking of sets. In the absence of any special requirements, the general country of origin marking rule applies which requires that every article that is imported into the United States must be marked to indicate its country of origin as determined by where the article underwent its last substantial transformation.

In HRL 559067, Customs concluded that the operations performed to package the various components to form the telephone sets are extremely simple and that no substantial transformation of the non-Malaysian components will occur by virtue of the gathering of the components and placing them in the retail cartons in Malaysia. Accordingly, the country of origin of each component should be identified on the retail container. *See* HRL 734560, dated July 20, 1992. Alternatively, Customs stated that the importer could mark each individual component with its country of origin instead of adopting the marking of the retail container and opt not to exercise the 19 CFR 134.32(d) exception for the telephone sets. If this approach is used, Customs emphasized that, without exception, each and every component would have to be marked with its country of origin. By marking each component, we indicated that it would remain clear to the ultimate purchaser that only the marked component, and not the telephone set as a whole, originates from the country designated on any one component.

You cite to HRL 734363, dated February 18, 1992, in which Customs addressed the issue of whether a country of origin marking for a modem that is produced in the United States,

but contained a foreign-made transformer (or power cord as it will be referred to in this ruling) and telephone cable (or telephone line), was properly marked if the origin of the two foreign articles (the power cord and telephone line) was not indicated on the sealed container. The importer sought approval of a marking which stated "Transformer and telephone cable of foreign origin are individually marked with specific country of origin." Customs approved this marking because the power cord and the telephone line represented a very small part of the cost of the modem kits, they were of relatively minor significance, and there were difficulties associated with marking the containers with the country of origin of the telephone line and power cord because the country of origin of the power cord and telephone line would vary. In accordance with the "common sense" approach to marking articulated in T.D. 91–7, Customs concluded that it was not necessary to mark the containers to indicate the country of origin of the power cord and the telephone line, provided the container referenced the fact that these articles were of foreign origin and informed the consumer that the articles at issue were individually marked with their specific country of origin. Customs would have no objection to the marking of each of the articles of foreign origin included in the cordless telephone sets in the manner that was deemed acceptable in HRL 734363.

We disagree with your conclusion that HRL 555365, dated September 7, 1990, T.D. 91–7, and HRL 734172, dated December 16, 1992, mandate a completely different conclusion than was reached in HRL 559067. Customs has stated that, in certain circumstances, the marking of every item in a collection of goods may not be consistent with the purpose of section 1304, or may be impractical and/or undesirable. This may exist because one or more items in the collection are relatively insignificant and would have no influence on the purchasing decision because the items in the collection are too numerous, thereby making it impractical to specify the country of origin of each item, or for various other reasons.

You claim that the marking of each article or identifying the origin of each article included in the cordless telephone set on its retail container is economically prohibitive. We disagree and refer you to HRL 734505, dated August 27, 1992, where Customs addressed the marking requirements of a portable light/lantern consisting of five major components: the lantern body, a plastic charging rack, a charging cord/converter, a rechargeable battery, and a flood lamp. These components were produced in various countries and were imported into the United States to be packaged. Customs determined that the packaging of these components did not result in a substantial transformation noting that some of the parts, after assembly, retained their independent function. Customs also rejected the importer's claim that it would be economically prohibitive to mark the article's actual country of origin given the variety of different combinations of packaged components because no evidence in support of this claim was submitted. As a possible option, Customs suggested that another possibility would be the use of a pre-printed label that contains all the possible countries of origin printed on it for each component. Then, upon assembly, the actual country of origin could be punched or marked on the pre-printed label. This marking scheme must comply with the Customs statutes and regulations 19 U.S.C. 1304, and 19 CFR Part 134. Customs would have no objection to a marking on the retail container referring to each of the specific articles of foreign origin as was suggested in HRL 734505.

Upon reconsideration of the application of the "common sense approach" of marking to the cordless telephone sets, it is our opinion that the marking of the telephone line Is analogous to the loose screws for the junction boxes (HRL 555365) and the metal channels and branch-off clips included in the finished insulation kit (HRL 734172). In both of these cases, Customs determined that certain articles were of minor importance to the product as a whole (the screws in HRL 555365 and the branch of clips in HRL 734172). Accordingly, the container was not required to be separately marked to indicate the country of origin of the screws in HRL 555365 and the metal channels and branch-off clips in HRL 734172. Similarly, Customs would not require that the telephone line when incorporated into the cordless telephone set be separately marked with its country of origin. In determining whether a particular component need not be marked under the "common sense approach", Customs emphasizes the role of the given component with respect to the complete set over any other consideration. The value alone of the component relative to the article's total cost is not necessarily determinative of whether the component is excepted from marking based on T.D. 91–7. In this case, the fact that the telephone line for either model represents less than one percent of the cost of the imported telephone set, however, supports our conclusion that the telephone line need not be marked.

However, the power cord presents a situation that is distinguishable from that relating to the loose screws for the junction boxes (HRL 555365), the metal channels and branch-off clips included in the finished insulation kit (HRL 734172), and the telephone line for the telephone sets at issue in this ruling. While the value of the power cord may not be substantial relative to the total cost of the cordless telephone set, its role of recharging the battery is critical to the operation of the telephone. As noted above, HRL 555365 presented a situation in which Customs determined that the country of origin of three foreign-made screws packaged with a U.S.-made metal junction box did not need to be noted on the retail package because the screws lost their separate identity when they were packaged with the junction box. Customs noted that the ultimate purchaser was buying a junction box and not individual screws. In contrast, the power cord will retain its separate identity. In fact, the ultimate purchaser is buying a cordless telephone because it is capable of converting electricity into stored power for the telephone. We disagree with your contention that our position in HRL 559067 and in this ruling letter represents a departure from past practice and T.D. 91-7. Accordingly, the notice and comment procedure described in 19 U.S.C. 1625(c) was not deemed necessary when HRL 559067 was first issued.

You state in your submission that TCE will incur substantial additional marking expenses if TCE is required to mark each individual component with its individual country of origin or if TCE indicates the origin of each component on the consumer carton. You estimate that TCE will incur approximately a $1 per unit additional cost to comply with the country of origin marking requirements using stick-on labels or $2 per unit to have new cartons printed.

It is the opinion of this office that you have not provided sufficient information upon which to grant an exception from individual marking based upon prohibitive economic expense. While we do not doubt the veracity of your statement that marking by means of placing labels on each component would be economically burdensome, the mere assertion that a $1 per unit increase in cost will be "prohibitive" does not provide a sufficient basis for granting this exception to the marking requirement. In addition, we note that it is our policy not to allow a permanent marking exception based upon the prohibitive economic expense provisions under 19 U.S.C. 1304(a)(3)(C) and 19 CFR 134.32(c). While Customs appreciates the fact that TCE is a consumer products company that must be concerned about the appearance of their products for marketing purposes, the fact remains, however, that TCE must comply with the statutorily-mandated marking requirements. The mere assertion, without supporting evidence, that stick-on labels may have an adverse marketing impact which may cause a loss in consumer appeal is not a basis upon which Customs may grant an exception from marking. Accordingly, we find that the components may not be excepted from country of origin marking under 19 U.S.C. 1304(a)(3)(C) and 19 CFR 134.32(c).

Holding:

Upon reconsideration of HRL 559067, Customs affirms its holding that telephone components packed together as a set are not substantially transformed by virtue of being packaged as a unit for sale as a telephone set. However, we find that pursuant to the "common-sense approach" to marking articulated in T.D. 91-7, the telephone line does not need to be marked. Consequently, HRL 559057 is modified to reflect this finding. The country of origin of the telephone power cord, however, must be identified as described above. Customs is not persuaded that the power cord does not need to: be marked based on the "common-sense approach" to marking. In addition, Customs is not persuaded that there is sufficient evidence to allow a marking exception for the power cord based on the assertion that it would be economically prohibitive to comply with the marking requirements. Your request for a delayed effective date of HRL 559067 is denied for the reasons set forth above.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

In accordance with 19 U.S.C. 1625(c)(1), this modification of HRL 559067 will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 C.F.R. 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF LUNCH BOX-TYPE HANDBAG

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of a lunch box-type handbag. This article is a womens handbag of light gauge, tin-plated steel that resembles a metal lunch box. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before August 30, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, D.C. 20229. Submitted comments may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of lunch box-type handbags. Customs invites comments on the correctness of the proposed revocation.

In *NY* A80887, dated March 13, 1996, certain containers made of light gauge, tin-plated steel, resembling metal lunch boxes, were held to be classifiable as containers of iron or steel of a kind normally carried on the person, in the pocket or in the handbag, in subheading 7326.90.35, Harmonized Tariff Schedule of the United States (HTSUS). This ruling was based on Customs belief that this provision was more specific than another subheading within heading 7326 for other articles of tinplate. *NY* A80887 is set forth as "Attachment A" to this document. It is now Customs position that under the authority of General Rule of Interpretation (GRI) 1, applied at the subheading level through GRI 6, the lunch box-type handbags are classifiable as other articles of tinplate.

Customs intends to revoke *NY* A80887 to reflect the proper classification of lunch box-type handbags of light gauge, tin-plated steel under subheading 7326.90.10, HTSUS. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 959174 revoking *NY* A80887 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: July 12, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 13, 1995.

CLA-2-73:RR:NC:GI:113 A80887
Category: Classification
Tariff No. 7326.90.3500

MS. PATTI KNIEST
EDISON BROTHERS STORES, INC.
501 N. Broadway
P.O. Box 66995
St. Louis, MO 63166-6995

Re: The tariff classification of a lunch box handbag from India.

DEAR MS. KNIEST:

In your letter dated February 29, 1996, you requested a tariff classification ruling.

The merchandise is item number 70054, a container that resembles a lunch box with a handle and an attached textile shoulder strap. The lunch box is made of painted, tin-plated steel. It measures approximately 9 inches long, 3.5 inches wide, and 5 inches deep. The hinged lid is secured by two hasps and staples.

The applicable subheading for the lurch box will be 7326.90.3500, Harmonized Tariff Schedule of the United States (HTS), which provides for containers of a kind normally carried on the person, in the pocket or in the handbag. The rate of duty will be 7.8 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. It you have any questions regarding the ruling, contact National Import Specialist James Smyth at 212-466-2084.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:MM 959174 JAS
Category: Classification
Tariff No. 7326.90.35

MS. PATTI KNIEST
EDISON BROTHERS STORES INC.
P.O. Box 66995
St. Louis, MO 63166-6995

Re: *NY* A80887 Revoked; metal, domed lunch box-shaped handbag; container of tin-plated steel carried on the person; articles of tinplate, subheading 7326.90.10; GRI 6.

DEAR MS. KNIEST:

This is in response to your letter of April 16, 1996, requesting reconsideration of a ruling from the Director, National Commodity Specialist Division, New York, on the classification of a lunch box-type handbag In *NY* A80887, dated March 13, 1996, the handbag, of tin-plated steel, was found to be classifiable in subheading 7326.90.35, Harmonized Tariff Schedule of the United States (HTSUS), as containers of a kind normally carried on the person, in the pocket or in the handbag. We have reconsidered this ruling and determined that it is incorrect.

Facts:

The merchandise in *NY* A80887 was a domed lunch box-shaped handbag, of tin-plated steel, from India. This article, measuring approximately 9 inches × 3.5 inches × 5 inches, was described as resembling a lunch box with a handle and a textile shoulder strap, with a hinged lid secured by two hasps and staples.

You maintain that the more appropriate provision for the handbag is subheading 7326.90.10, HTSUS, other articles of tinplate. You contend that within heading 7326 this provision specifically describes the merchandise. We agree.

The provisions under consideration are as follows:

7326	Other articles of iron or steel:
7326.90	Other:
7326.90.10	Of tinplate * * * 1.4 percent *ad valorem* Other:
7326.90.35	Containers of a kind normally carried on the person, in the pocket or in the handbag * * * 7.8 percent *ad valorem*

Issue:

Whether the lunch box-shaped handbag is classifiable as an article of tinplate.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided the headings or notes do not require otherwise, according to GRIs 2 through 6. GRI 6 states, in relevant part that, for legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, by appropriate substitution of terms, to GRIs 1 through 5, on the understanding that only subheadings at the same level are comparable.

GRI 6 is the legal authority for classifying goods in the subheadings of a heading by applying GRIs 1 through 5, with appropriate substitution of terms. Applying GRI 1 at the subheading level through GRI 6, the lunch box-shaped handbag is within the provision for other articles of tinplate.

Holding:

Under the authority of GRI 1, applied at the subheading level by GRI 6, the domed, lunch box-shaped handbag of tin-plated steel is provided for in heading 7326. It is classifiable in subheading 7326.90.10, HTSUS.

NY A80887, dated March 13, 1996, is revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF MEN'S KNIT PANTS AND SHORTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057). this notIce advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of certain men's knit pants and shorts. Notice of the proposed revocation was published June 12, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 24.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 30, 1996.

FOR FURTHER INFORMATION CONTACT: Josephine Baiamonte, Textile Classification Branch, (202) 482–7058.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On June 12, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 24, proposing to revoke New York Ruling Letter (NY) 817100, dated December 29, 1995. No comments were received from interested parties.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat 2057), this notice advises interested parties that Customs is revoking NY 817100 to reflect proper classification of the men's knit pants and shorts in subheading 6107.91.0030, of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for men's or boys' underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles,

knitted or crocheted: other: of cotton: sleepwear. Headquarters Ruling Letter (HQ) 958840, revoking NY 817100, is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change in practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177. 10(c)(1)).

Dated: July 15, 1996.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 15, 1996.

CLA-2 RR:TC:TE 958840 jb
Category: Classification
Tariff No. 6107.91.0030

STEVEN P. KERSNER, ESQ.
ARLENE ARSZULOWICZ
ROSS & HARDIES
PARK AVENUE TOWER
65 East 55th Street
New York, NY 10022-3219

Re: Revocation of NY 817100; classification of men's cotton knit garments; cut and styling of multipurpose garments; documentation and advertising supportive of classification as sleepwear; heading 6107, HTSUSA.

DEAR MR. KERSNER AND MS. ARSZULOWICZ:

This is in reference to New York Ruling Letter (NY) 817100 issued to your client ISACO International, on December 29, 1995. Customs has reexamined the decision and determined that the decision was in error. NY 817100 classified the merchandise in subheading 6103.42.1010. Harmonized Tariff Schedule of tho United States Annotated (HTSUSA), as men's trousers, and subheading 6103.41.1050, HTSUSA, as men's shorts. Customs believes NY 817100 should be revoked to reflect the correct tariff classification in subheading 6107.91.0030, HTSUSA, as men's sleepwear. Samples were submitted to this office for examination.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 817100 was published on June 12, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 24.

Facts:

The merchandise at issue consists of two styles of 100 percent cotton finely knit men's garments to be imported from Thailand. You state that both garments are made of soft lightweight 100 percent cotton, 40/1 jersey, 100 grams/meter^2. The garments are either in a solid color or an all over print. The prospective imports will additionally feature a jacquard waistband with the words "Natural Issue".

The first style (no style number indicated), referred to as a "sleep/lounge pant", is a loose-fitting pant with elasticized leg openings and an exposed elasticized waist.

The second style (no style number indicated), referred to as a "sleep/lounge short", is a loose fitting-short with an exposed elasticized waist and a one button fly front opening which does not break the waistband, and hemmed leg openings.

In NY 817100 the subject merchandise was classified respectively in subheading 6103.42.1010, HTSUSA, as men's trousers, and subheading 6103.41.1050, HTSUSA, as men's shorts. You believe this classification is in error and that the merchandise is properly classified as men's sleepwear in subheading 6107.91.0030, HTSUSA.

It should be noted that two sets of samples were submitted. One set of samples featured side seam pockets on both the shorts and the pants. As the merchandise with the pockets did not correspond to the actual description of the merchandise detailed in your submission or with the merchandise described in NY 817100, that set of samples will be disregarded.

Issue:

Whether the subject garments are classifiable as men's knit sleepwear of heading 6107, HTSUSA or as men's multipurpose garments in heading 6103, HTSUSA?

Law and Analysis:

Classification of goods under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Where goods cannot be classified solely on the basis of GRI 1, the remaining GRI will be applied, in the order of appearance.

Heading 6107, HTSUSA, provides for, among other things, men's knitted or crocheted nightshirts, pajamas and similar articles. In determining the classification of garments submitted to be sleepwear, Customs considers the factors discussed in two decisions of the Court of International Trade. In *Mast Industries, Inc. v. United States,* 9 CIT 549, 552 (1985), aff'd 786 F.2d 1144 (CAFC, April 1, 1986), the Court of International Trade dealt with the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them Webster's Third New International Dictionary which defined "nightclothes" as "garments to be worn to bed". In *Mast,* the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International, Inc. v United States,* 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as night-wear.

The Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories, CIE 13/88 (1988), (hereinafter *Guidelines),* state that the term nightwear is interpreted as meaning "sleepwear" so that certain garments worn in bed in the daytime are included. The *Guidelines* further indicate that besides pajamas, other night-wear includes various articles worn for sleeping. Classification of garments as sleepwear is based upon use. In this regard, Additional U.S. Rule of Interpretation 1(a) provides that in the absence of context to the contrary, a tariff classification controlled by use, other than actual use, is to be determined by the principal use in the United States at, or immediately prior to, the date of importation, of goods of the same class or kind of merchandise.

In classification, the most persuasive evidence is the garment itself. The court in *Mast* citing *United States v. Bruce Duncan Co.,* 50 CCPA 43, 46 C.A.D. 817 (1963), pointed out that "the merchandise itself may be strong evidence of use." In regard to the specific merchandise submitted, it is the opinion of this office that the pants and the shorts are "borderline" garments, that is, they have features which could be attributed both to outerwear or sleepwear. For example, while the garments at issue are constructed from lightweight jersey knit fabric, the fabric is not so sheer that the contours of the body would be immodestly revealed should these garments be worn around the home. Additionally physical characteristics such as the absence of a fly and the presence of tunnel elastic leg bottoms on the pants, and the secure one button closure and hemmed leg openings on the shorts, suggest that the garments might be used as multipurpose garments.

In *St. Eve International, Inc. v. United States,* the court considered testimony that the garments were "designed, manufactured and advertised" by plaintiff as sleepwear. You state that the subject garments will be marketed as men's sleepwear and sold in the men's sleepwear department of stores. As such, you believe that the garments at issue are designed, ordered and will be promoted as nightwear, thereby meeting the parameters noted by the court. Despite ambiguities in the styling features of the garments, the docu-

mentation submitted by you with respect to these garments clearly substantiates your claim that these garments will be advertised and sold as sleepwear garments.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, your client should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

NOTE: This is to advise that Slip Op. 96–103 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 96–103)

PAUL T. BENNETT, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–02–00080

(Dated June 27, 1996)

(Slip Op. 96–104)

SHARP MICROELECTRONICS TECHNOLOGY, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–09–00536

[Plaintiff's motion for partial summary judgment denied. Defendant's motion for summary judgment granted.]

(Decided July 1, 1996)

Donovan Leisure Newton & Irvine (Peter J. Gartland, Christopher P. Johnson, David B. Pitofsky, David S. Versfelt, and *Fusae Nara)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Amy M. Rubin);* United States Customs Service *(Chi S. Choy),* of counsel, for defendant.

MEMORANDUM AND ORDER

I

INTRODUCTION

WALLACH, *Judge:* Plaintiff, Sharp Microelectronics Technology, Inc. ("Sharp"), challenges the classification of imported glass cells consist-

ing of two pieces of processed glass with a layer of liquid crystal material injected between them ("display glass") by the United States Customs Service ("Customs"). Customs classified the merchandise as "[l]iquid crystal devices not constituting articles provided for more specifically in other headings * * * Other devices * * * Other" under the Harmonized Tariff Schedule of the United States ("HTSUS") subheading 9013.80.60 and assessed duty at a rate of 9 percent *ad valorem*. The entries at issue in this action were imported through the port of Portland, Oregon from November, 1991 through March, 1993.

Sharp asserts that the display glass is properly classified under either HTSUS subheading 8471.92.30, as "Automatic data processing machines and units thereof; Input or output units * * * Display unit", duty rate is free, or, in the alternative, HTSUS subheading 8473.30.40 as "Parts and accessories of machines of Heading 8471 * * * Not incorporating a cathode ray tube", duty rate is free.

Sharp has submitted a motion for partial summary judgment.[1] Defendant has submitted a cross motion for summary judgment to uphold Customs' classification and dismiss this action.

This Court exercises its jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).

II

Statement of Facts

The imported merchandise at issue is referred to as "display glass".[2] The display glass displays text and graphics as the result of coded signals received from the central processing unit of an automatic data processing ("ADP") machine. Stip. 31–32. As imported, the display glass does not have stand-alone capacity to function as a display of an ADP machine, Stip. 3, and it does not store, process or accept data. Stip. 4.

The display glass consists of two rectangular shaped, ultra flat glass substrates, approximately 1.1 millimeters in thickness. Stip. 8. The inner surfaces of the glass substrates have been coated with indium tin oxide transparent electrodes and etched, creating 640 columns and, depending on the model, either 480 or 400 rows. Stip 9. The interior of each glass substrate is covered with a processed alignment layer causing the liquid crystal molecules to align in a fixed direction. Stip. 12.

When the glass substrates are joined, the electrodes are perpendicular to each other, creating a matrix. Stip. 14. The interior space between the glass substrates is filled with liquid crystals, and the glass substrates are hermetically sealed together. Stip. 15. An electric field can be applied across the liquid crystals to form picture elements, known as a pixels. Stip. 16.

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[1] In its Complaint, Sharp submitted a second alternative claim, subheading 8531.20.00, duty rate of 2.7 percent *ad valorem*, but did not move for summary judgment on this claim. Since the Court has granted Defendant's Motion For Summary Judgment, that claim is rendered moot.

[2] The parties have stipulated to a statement of uncontested facts ("Stip."), attached to Plaintiff's Motion for Summary Judgment, as Exhibit A. In addition, the parties also stipulated to a supplemental statement of uncontested facts ("Supp. Stip."), submitted with Defendant's Supplemental Memorandum, dated June 12, 1996.

Display glass operates through polarization of light, and liquid crystals are a means to alter that polarization. Stip. 22. Through selective application of voltage, pixels may be made to appear light or dark. Stip. 23–26. Through a combination of light and dark pixels, visible images of text and graphics can be created that are visible from the front of the display glass. Stip. 27.

Large-scale integrated flexible circuits are attached to the display glass at the indium tin oxide electrodes which protrude from top, bottom and left edges of the display glass. Supp. Stip. 5. Two printed wiring boards incorporating segment driver electronics are attached to the large-scale integrated flexible circuits attached to the top and bottom of the display glass. Supp. Stip. 6. A third printed wiring board incorporating common driver electronics is attached to the large-scale integrated flexible circuits at the left of the display glass. Supp. Stip. 7. Both ends of the printed wiring board incorporating common driver electronics are connected to the printed wiring boards with segment drivers. Supp. Stip. 8.

The display glass is connected to an ADP machine by means of a fifteen-pin connector mounted on the printed wiring board at the left of the display glass together with the common driver electronics. Supp. Stip. 10. The segment and common driver electronics receive signals from the CPU through the graphic chip. Supp. Stip. 11.

Both the CPU and the graphic chip are mounted on the main processor board of the ADP, and are connected to each other by means of 16–bit bus. Supp. Stip. 12. The digital command signals received from the CPU is processed by the graphic chip, which executes the commands and "writes" the displayable image into dynamic memory. Supp. Stip. 13. The signals are then transferred from the dynamic memory to the driver electronics by the graphic chip and are displayed as text and graphics on the display glass. Supp. Stip. 14.

III

Discussion

A

Summary Judgment May be Granted When There are No Genuine Issues of Material Fact in Dispute and the Moving Party is Entitled to Summary Judgment as a Matter of Law

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT Rule 56(d). The Court may grant summary judgment only if the Court finds that no genuine issues of material fact exist. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1988). No genuine issues of material fact exist here, and summary judgment may be granted as a matter of law.

B

CUSTOMS PROPERLY CLASSIFIED THE IMPORTED MERCHANDISE UNDER HTSUS 9013.80.60

1

CUSTOMS IS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS IN A SUMMARY JUDGMENT MOTION WHERE THERE ARE NO MATERIAL FACTS IN DISPUTE

The presumption of correctness which is statutorily mandated in 28 U.S.C. § 2639 is not relevant when there is no factual dispute between the parties. *Anval Nyby Powder AB v. United States,* 20 CIT ____, Slip Op. 96-80 at 11 (May 21, 1996) (citing *Goodman Mfg., L.P. v. United States,* 69 F.3d 505, 508 (Fed. Cir. 1995)). Therefore, Defendant is not entitled to a presumption of correctness in this summary judgment action.[3] Instead, the Court must "reach the correct decision" as prescribed in 28 U.S.C. § 2643. *See Jarvis Clark Co. v. United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984) (The "Court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand."). As will be discussed below, the Court finds that Defendant has established that Customs' classification of the imported merchandise is correct.

2

HEADING 9013, HTSUS, MORE SPECIFICALLY DESCRIBES THE SUBJECT MERCHANDISE THAN HEADING 8471 OR HEADING 8473

Customs classified the display glass at issue under HTSUS 9013.80.60 which reads, in part:

9013	Liquid crystal devices not constituting articles provided for more specifically in other headings; lasers, other than laser diodes; other optical appliances and instruments, not specified or included elsewhere in this chapter; parts and accessories thereof:
.80	Other devices, appliances and instruments:
.60	Other.

General Rule of Interpretation ("GRI") 1 of the HTSUS states that "* * * for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes." As an aid to determining the meaning of a particular tariff term, the Court may look to the *Explanatory Notes* which, although not legally binding on the Court, generally are indicative of the proper interpretation of the HTSUS. *Pima Western, Inc. v. United States,* Slip. Op. 96-17 at 2, 1996 WL 19312 (CIT 1996). The *Explanatory Notes* were published by the Customs Cooperation Council ("CCC") which was established in 1950

[3] Defendant cited *Marubeni America Corp. v. United States,* 20 CIT ____, Slip Op. 96-24 at 12 (January 23, 1996), in footnote 2 of its Reply for the proposition that the Government's legal interpretation of the scope of a tariff provision is entitled to deference. *Marubeni* held only that the importer's interpretation of a tariff provision was not entitled to deference. *Id.* at 13.

and was responsible for drafting a system to handle commodity descriptions and coding for the trading nations of the world. *Interim Report on the Harmonized Commodity Description and Coding System,* USITC Pub. No. 1106 at 3–8, 12 (1980).

When Congress adopted the Harmonized Commodity Description and Coding System under the International Convention as the Harmonized Tariff System of the United States (HTSUS) through the enactment of the Omnibus Trade and Competitiveness Act of 1988, *see* Pub. L. 100–418, sec. 1201 & 1204, 102 Stat. 1107, 1147–48 (1988), Congress did not comment on the scope of Heading 9013. Prior to the adoption of the Convention by Congress, however, documents were prepared by the Nomenclature Committee and the Harmonized System Committee of the CCC. These documents chronicle the work of the committees as they developed the Harmonized System and may provide insight.

The earliest drafts of Heading 9013 did *not* contain the term "liquid crystal device." In 1979, the discussion of liquid crystal displays originated with a concern over how to classify liquid crystal displays used with electronic clocks and watches, which, as electro-optical devices, were potentially classifiable in both Chapter 85 and Chapter 90. The Committee contemplated whether liquid crystal displays should be classified as finished articles or as devices of indeterminate or general use. The Committee thought that while it seemed "desirable to classify these devices as far as possible in a single heading," *Reports to the Customs Cooperation Council on the 43rd Session of the Nomenclature Committee,* Doc. No. 25.466 E (Aug. 14, 1979) ("Reports to the CCC"), Exhibit A to Plaintiff's Supplemental Memorandum of June 12, 1996, at ¶ 12 (P's Supp. 6/12/96), it might be "advisable to *leave the finished articles in their appropriate headings* * * * The same applies to parts identifiable as being specially designed for a specific machine or apparatus." *Id.* (emphasis in original).

Subsequently, the Committee concluded that "finished articles using the properties of liquid crystals which were covered by a specific heading should be classified in that heading * * * ." *Reports to the CCC,* Annex F/11 to Doc. 25.700 E (NC/43/Oct. 79) at ¶ 2 (Exhibit B to P's Supp. 6/12/96).

Thus, the Committee sought to create a provision that would place liquid crystal devices in one place, but would not include articles covered by a more specific heading. As a result, liquid crystal devices were separated into two categories: 1) finished articles incorporating liquid crystal properties and covered by a specific heading (the heading of the finished article such as a thermometer which uses liquid crystal properties to indicate temperature) and 2) indeterminate or general use liquid crystal devices to be classified under heading 9013. *See id.* In making this decision, the Committee stated that "[i]t was decided that **finished articles,** other than those for indeterminate or general use, incorporating liquid crystals should fall in their respective headings **insofar as they were covered by a specific heading** * * *." *Reports to the CCC,*

Doc. 26.640 E (HC/24/Oct. 80) (Exhibit K to D's Supp. 6/12/96) (emphasis added).

The *Explanatory Note* to Heading 9013 was amended to reflect the Committee's consideration of liquid crystal devices and to define liquid crystal devices in language that is almost identical to that which exists today.[4] The current *Explanatory Note* states that: "Liquid crystal devices consisting of a liquid crystal layer sandwiched between two sheets or plates of glass or plastics, whether or not fitted with electrical connections, presented in the piece or cut to special shapes and not constituting articles described more specifically in other headings * * *" are included in Heading 9013. *Explanatory Notes,* 90.13 (1) p. 1478. The display glass fits this description of liquid crystal devices. The display glass consists of two ultra flat glass substrates, Stip. 8, and the interior of each glass substrate is covered with a processed alignment layer causing the liquid crystal molecules to align in a fixed direction. Stip. 12. Further, the classification of the display glass as a liquid crystal device of Heading 9013 is in accordance with the Committee's discussion on liquid crystal devices because the display glass is not a "finished article" which is covered by a "specific heading". Although the *Explanatory Note* to Chapter 90 indicates that the term "liquid crystal devices" encompasses the display glass, the Court must continue its GRI 1 analysis to determine the correct classification.

Here, the specific phrase of Heading 9013 which may apply to the display glass is "[l]iquid crystal devices not constituting articles provided for more specifically in other headings". This phrase requires the Court to perform an analysis of the other headings in the HTSUS in order to determine whether there is a heading that more specifically describes the display glass (the liquid crystal device) than Heading 9013.

Plaintiff proposes the display glass is properly classified under either HTSUS subheading 8471.92.30, as "Automatic data processing machines and units thereof; Input or output units * * * Display unit", or, in the alternative, HTSUS subheading 8473.30.40 as "Parts and accessories of machines of Heading 8471 * * * Not incorporating a cathode ray tube". As discussed below, the Court rejects both of Plaintiff's suggested headings and finds that Heading 9013 provides the most specific description of the subject merchandise.

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[4] Liquid crystal devices consisting of a liquid crystal layer sandwiched between two sheets or plates of glass or plastic material, whether or not fitted with electrical connections, imported in the piece or cut to special shapes and not constituting articles described more specifically in other headings. *Reports to the Customs Cooperation Council on the 44th Session of the Nomenclature Committee Reports to the CCC,* Annexes L/26 and E/18 to Doc. 26.300 E (NC/44/Apr. 80); Exhibit C to P's Supp. 6/12/96.

A

THE MERCHANDISE DOES NOT POSSESS THE ESSENTIAL CHARACTER OF AN OUTPUT UNIT FOR AN ADP MACHINE AND THEREFORE MAY NOT BE CLASSIFIED UNDER HTSUS 8471

The Court rejects Plaintiff's claims that the display glass is properly classifiable under HTSUS 8471.92.30, which provides for, in part:

8471	Automatic data processing machines and units thereof; * * *
.92	Input or output units, whether or not entered with the rest of the system and whether or not containing storage units in the same housing:
	Display units:
.30	Without cathode-ray tube (CRT), having a visual display diagonal not exceeding 30.5 cm.

Plaintiff argues that its merchandise falls under subheading 8471.92.30 for three reasons: (1) the imported merchandise is an "output unit" as that term is used in subheading 8471.92; (2) the imported merchandise meets the definition of "unit" in Note 5(b) to Chapter 84; and (3) the imported merchandise has the "essential character" of the display of an ADP machine when viewed according to GRI Rule 2(a). Plaintiff's Motion For Summary Judgment at 21 (hereinafter "PMSJ"). The Court rejects each argument, as discussed below.

I

THE DISPLAY GLASS DOES NOT MEET THE DEFINITION OF "OUTPUT UNIT" AS USED IN HTSUS 8471.92

Plaintiff submits that "output unit" is defined as "[a] device in a data processing system by which data can be received from the system. Synonymous with output device." PMSJ at 22 (quoting *IBM Dictionary of Computing,* p. 487 (10th ed. 1993)). Further, Plaintiff defines "output device" as "[a] unit used for taking out data values from a computer and presenting them in the desired form to the user, such as a printer or display screen." PMSJ at 22 (emphasis omitted) (quoting *Webster's New World Dictionary of Computing Terms,* p. 419 (5th ed. 1994)).

Plaintiff argues that the display glass meets the definitions above, thus falling within the common meaning of the term "output unit". "[T]he display glass functions as the screen on which text and graphics are presented so that the user of a laptop or notebook ADP machine can obtain the information from the ADP machine." PMSJ at 22–23.

The Court finds, however, that the display glass does not come within the meaning of the term "output unit" because in its condition as imported, the display glass cannot receive data. The ability to receive data is given to an output unit by other components (including, *inter alia,* flexible circuits, the large-scale integrated circuits, the wiring boards, and graphics chip) which the display glass does not have attached to it. *See, supra,* pages 3–4 (statement of facts).

II

THE MERCHANDISE IS NOT A "UNIT" AS DESCRIBED IN NOTE 5(B) TO CHAPTER 84

Plaintiff also argues that the display glass is a "unit" as described in Note 5(B) to Chapter 84 which provides that:

> (B) Automatic data processing machines may be in the form of systems consisting of a variable number of separately housed units. A unit is to be regarded as being a part of the complete system if it meets all of the following conditions:
>
> (a) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (b) It is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system). Such systems entered separately are also to be classified in heading 8471.

Plaintiff submits that the display glass meets the requirements of subsection (a) because the display glass is connectable to the central processing unit of an ADP machine through integrated circuits on flexible circuits, wiring boards and a graphic chip. PMSJ at 24. Further, the display glass is connected to the central processing unit of an ADP machine at the contact points that protrude from three edges of the glass. The contact points allow the indium tin oxide electrodes of the display glass to receive positive and negative voltages from the CPU of the ADP machine. Plaintiff's Reply Memorandum at 8 ("P's Reply") (citing Stip. 31). Because the display glass is designed as part of an ADP system and can accept data in a form used by the system, Plaintiff claims it meets the requirements of subsection (b) of Note 5(B) to Chapter 84.

The fact, however, that the display glass by itself is not a unit which may be directly connected to the central processing unit (CPU) precludes the display glass from meeting the requirements of Note 5(B). *See, supra,* pages 3–4 (statement of facts). The display glass must be assembled with the flexible circuits, the large-scale integrated circuits, the wiring boards, and graphics chip before it may be connected to the CPU. Further, the Court finds valid Defendant's contention that these components are not "units" within the meaning of Note 5(B) because a "unit" is "an assembly or device capable of independent operation, such as a radio receiver, cathode-ray oscilloscope, or computer subassembly that performs some inclusive operation or function". Defendant's Cross Motion For Summary Judgment at 19 ("DCMSJ") (quoting *McGraw-Hill Dictionary of Scientific and Technical Terms,* p. 1705 (3rd Ed.)).

III

THE MERCHANDISE DOES NOT POSSESS THE ESSENTIAL CHARACTER OF AN OUTPUT UNIT OF AN AUTOMATIC DATA PROCESSING (ADP) MACHINE

Plaintiff also argues that the display glass has the essential character of an output unit of an ADP machine. GRI 2(a) states, in part: "[a]ny

reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article." First, Plaintiff submits that "the display glass is what leaps to mind when reference is made to an output unit of a laptop or notebook sized ADP machine." PMSJ at 25. In addition, according to Plaintiff, "performance characteristics enumerated in Section D of the Statement of the Material Facts *are embedded in the display glass*, and these performance characteristics constitute the essential characteristics of an output unit for an ADP machine." PMSJ at 25. Plaintiff further says, the display glass possesses all the typical characteristics of a display unit for a laptop or notebook ADP machine (pixel configuration, dot pitch, thin profile, light weight, liquid crystal material mix, and low power consumption). PMSJ at 26 (citing HQ 952973 (Aug. 5, 1993)); *see also* HQ 952502 (Mar. 18, 1993); HQ 951868 (Oct. 31, 1992).

"[A]n article need not have stand-alone capability in order to be classified under an *eo nomine* provision that describes it." *Nidec Corp. v. United States,* 18 CIT ____, ____, 861 F. Supp. 136, 141 (1994) (citing *National Advanced Systems v United States,* 26 F.3d 1107, 1110–11 (Fed. Cir. 1994)). However, the Court finds that because the display glass lacks "the bezel, the cable connector, the LSI (Large Scale Integrated chips), the diffuser, the rubber spacer, the light pipe, the reflector, the plastic chassis, the lamp, the lampholder, the connector, and the connection wire", HQ 951868 at 4, the display glass does not impart the essential character of a finished ADP output display. The *Explanatory Notes* to Chapter 84 state that: "Automatic data processing machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions (program), furnish data which can be used as such or, in some cases, serve in turn as data for other data processing operations * * *". *Explanatory Notes* 84.71 (I) p. 1297. Thus, it is the ability to process data that gives the essential character to articles under Heading 8471.

The Court, therefore, finds that the display glass may not be properly classified under Heading 8471. A comparison between Heading 9013 and Heading 8471 is therefore unnecessary.

B

THE MERCHANDISE IS CLASSIFIABLE AS A PART OF AN ADP MACHINE UNDER HTSUS 8473 BECAUSE IT CONSTITUTES AN INTEGRAL ELEMENT OF THE OUTPUT UNIT OF AN ADP MACHINE

Plaintiff's alternative classification for the display glass is HTSUS 8473.30.40, which reads:

> 8473 Parts and accessories * * * suitable for use solely or principally with machines of headings 8469 to 8472:

.30 Parts and accessories of machines of heading 8471 [automatic data processing machines and units thereof]:

.40 Not incorporating a cathode ray tube.

The term "part" is defined as "an essential portion or integral element of something." PMSJ at 28 (citing *Websters Third New International Dictionary, Unabridged,* p. 1645 (1981)). This Court has stated that in order to prevail on its claim that something is a part, "plaintiff's burden consists of demonstrating that the [article claimed to be a part] is an integral component of the [finished article], without which the [finished article] could not operate in its intended capacity." *Technicolor Videocassette, Inc. v. U.S.,* 18 CIT ____, ____, 846 F. Supp. 1005, 1008 (1994), *vacated on other grounds,* 47 F.3d 1183 (Fed. Cir. 1995). Plaintiff argues that "the display glass is an essential portion or integral element of the output unit of a laptop or notebook ADP machine, and without the display glass the output unit cannot operate." According to Plaintiff, then, the display glass is part of an ADP machine under Heading 8473. PMSJ at 28–29.

The Court agrees with Plaintiff's assertion that Heading 8473 is a use provision. *See* PMSJ at 29. When classification in a heading is controlled by "use (other than actual use)", it is subject to Rule 1(a) of the Additional U.S. Rules of Interpretation, which provides: (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use. In order for the display glass to be classifiable under Heading 8473, the display glass must be solely or principally for use in an ADP machine.

Plaintiff submits that the display glass belongs to the class or kind of goods known as "high information content monochromatic liquid crystal display glass", in that it has over 120,000 pixels, a visible display diagonal not exceeding 30.5 centimeters and the capability of displaying text and graphics as the result of being connected to the central processing unit of an ADP machine. At, or immediately prior to, the date of importation of the display glass subject to this action, this kind or class or merchandise was used primarily as part of laptop or notebook ADP machines. PMSJ at 30, Stip. 1. The Court finds that Plaintiff has met its burden under the "use" provision and that the display glass may be properly classified as a part of an ADP machine classifiable under Heading 8473.

Defendant concedes that the display glass can be described as a part of an ADP machine. DCMSJ at 22. However, Defendant argues that Chapter Note 1(m) to Section XVI prohibits the display glass from being classified in Heading 8473 and, in the alternative, that Heading 9013 provides the more specific provision for the display glass. For the reasons that follow, the Court agrees with both of Defendant's contentions.

C

NOTE 1(M) TO SECTION XVI PROHIBITS CLASSIFICATION OF THE DISPLAY GLASS UNDER HEADING 8473

Note 1(m) of Section XVI provides, in part, that "[t]his section [which includes chapter 84] does not cover: Articles of Chapter 90." As stated above, GRI 1 mandates the examination of any relative section or chapter notes in determining classification. Indeed, the *Explanatory Notes* to GRI 1 state that "the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." *Explanatory Notes,* GRI 1 (V). Therefore, Note 1(m) to Section XVI is controlling under GRI 1.

Plaintiff argues that Heading 9013 does not encompass the display glass because Heading 9013 provides for classification in the more specific heading, thus classifying the good elsewhere. "Because the subject display glass is not an 'Article of Chapter 90' it does not fall within the scope of Note 1(m), and is properly classifiable under Section XVI." P's Reply at 5. In other words, Heading 9013, by its own terms, applies only when there is not a more specific provision. Because there is a more specific provision, according to Plaintiff, Heading 9013 is inapplicable, making Note 1(m) irrelevant. P's Reply 5–6.

Defendant submits, on the other hand, that "if an article can be classified in Chapter 90, HTSUS, it can **not** be classified in the chapters of Section XVI, HTSUS." Defendant's Reply To Plaintiff's Brief at 3–4 (D's Reply). Defendant submits that the purpose of this note was to cover cases when an article possesses characteristics which render it potentially classifiable under both Chapter 90 and a chapter of Section XVI, resulting in the classification of the good in Chapter 90. D's Reply at 4.

The issue in this case, then, is similar to the question "which came first, the chicken or the egg?" In other words, which comes first, the determination that the subject merchandise may be classified under Heading 9013, then an examination of the other headings of the HTSUS to determine if there is a more specific provision for the subject merchandise, in which case if the alternative classification is within Section XVI Note 1(m) to that section directs classification under Heading 9013? Or, does the initial reading of Heading 9013 immediately send the reader to the other provisions of the HTSUS to determine if another provision more specifically describes the subject merchandise than Heading 9013, in which case Note 1(m) to Section XVI would be irrelevant?

The Court finds that classification in Chapter 90 comes before an examination of other HTSUS provisions which may more specifically provide for the liquid crystal devices. In order for Heading 9013 to apply, it first must be determined that the display glass could fit within the description for "liquid crystal devices". Obviously, if the display glass did not meet the definition of liquid crystal devices, the Court's inquiry into Heading 9013 would end. However, as shown above, the display glass does meet the description of liquid crystal devices found in the

Explanatory Notes, and as a result, the Court must continue to examine the provisions of 9013. Next, it must be determined whether there is another heading in the HTSUS in which the liquid crystal devices constitute articles provided for more specifically than under Heading 9013.

As discussed above, both parties and the Court agree that Heading 8473 also provides for the display glass as a part of an ADP machine. However, Heading 8473 falls within Section XVI which contains Chapter Note 1(m) excluding articles of Chapter 90 from classification within Section XVI. Therefore, the display glass, as an article of Chapter 90, must be classified under Heading 9013.[5]

Even if the Court were to put the chicken before the egg, it would still conclude that Heading 9013 provides more specifically for the subject merchandise than Heading 8473. When determining relative specificity, the Court looks at the provision with "requirements which are more difficult to satisfy and which describe the article with the greatest degree of accuracy and certainty." *Amersham Corp. v. United States,* 5 CIT 49, 66 (1983).[6] As added guidance, additional U.S. Rule of Interpretation 1(c) provides that "a provision for 'parts and accessories' shall not prevail over a specific provision for such part or accessory." The Court finds that Heading 9013 contains a specific provision for liquid crystal devices and thus is more specific than the part provision under Heading 8473.

Here, Heading 9013 provides the most specific description of the subject merchandise and has requirements which are more difficult to satisfy, as illustrated above by the discussion of the *Explanatory Note* defining the liquid crystal devices and how the display glass meets that definition.

By contrast, Heading 8473 only requires that the merchandise is solely or principally used as a part or accessory. For example, parts of typewriters and word processing machines (Heading 8469), parts of calculating machines, accounting machines, postage-franking machines, ticket-issuing machines and similar machines, incorporating a calculating device, and cash registers (Heading 8470), other parts of computers (Heading 8471), and parts of other office machines (Heading 8472), all may be classified under Heading 8473. Thus, it is easier to be classified as a part or accessory of any of the machines enumerated above than it is

[5] The Court rejects Plaintiff's argument that Note 2(a) to Chapter 90 mandates classification under Heading 8473. Note 2(a) provides that "* * * parts and accessories for machines, apparatus, instruments or articles of [Chapter 90] are to be classified according to the following rules: (a) Parts and accessories which are goods included in any of the headings of this chapter or of chapter 84, 85, or 91 * * * are in all cases to be classified in their respective headings." Note 2(a) does not apply to the display glass because Note 2 does not apply. The display glass is itself an article of chapter 90, as a liquid crystal device. The display glass is not a part or accessory for the liquid crystal devices encompassed in Heading 9013 and therefore Note 2(a) is inapplicable.

[6] The Court notes in passing that a relative specificity analysis under GRI 3(a) is inappropriate because classification may be determined in the case under GRI 1. As stated in the *Explanatory Note* to GRI 3, this "Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require**." *Explanatory Notes*, GRI 3(II) (emphasis in original). As it is the terms of Heading 9013 which require the specificity analysis in this case, GRI 3(a) does not apply.

to be a liquid crystal device. Heading 9013, therefore, provides more specifically for the subject merchandise than Heading 8473.[7]

IV

CONCLUSION

For the foregoing reasons, the Court denies Plaintiff Sharp Microelectronics Technology, Inc.'s motion for partial summary judgment, grants Defendant United States' motion for summary judgment, and enters final judgment in favor of the United States.

(Slip Op. 96–105)

HYUNDAI ELECTRONICS INDUSTRIES CO., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION, DEFENDANT

Consolidated Court No. 93–06–00319

(Dated July 5, 1996)

ORDER

GOLDBERG, *Judge:* Upon consideration of plaintiffs' Motion for Immediate Remand, and of all other papers filed and proceedings had herein, it is hereby

ORDERED that plaintiff's Motion is granted; it is further

ORDERED that this action is remanded to the International Trade Commission (the "Commission") for reconsideration of its final determination in *DRAMs of One Megabit and Above from the Republic of Korea,* 58 Fed. Reg. 28,036 (May 12, 1993); Inv. No. 731–TA–556 (Final), USITC Pub. 2629 (May 1993), in light of the Department of Commerce's August 24, 1995 revised final determination affirmed by this Court in Slip Op. No. 95–175 (Oct. 27, 1995); it is further

ORDERED that the Commission shall, within ninety (90) days of the date of this Order, issue a remand determination in accordance with the instructions provided herein; it is further

ORDERED that the parties may, within twenty (20) days of the date on which the Commission issues its remand determination, submit memoranda addressing the Commission's remand determination, not to exceed forty (40) pages in length; and it is further

ORDERED that the parties may, within twenty (20) days of the date on which memoranda addressing the Commission's remand determination are filed, submit response briefs, not to exceed forty (40) pages in length.

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[7] Plaintiff argued at length in its Motion that Heading 9013 was a "basket provision", P's Motion at 17–19, and that a provision for parts prevails over a basket provision. PMSJ at 33–36 (citing *United States v. Porter,* 68 CCPA 15, 645 F.2d 52 (1981)). The Court finds, however, that even if Heading 9013 is a "basket provision" for liquid crystal devices, it still more specifically describes the display glass than the provision for parts in Heading 8473. As stated previously, Additional U.S. Rule of Interpretation 1(c) provides that a specific provision for a part prevails over a provision for 'parts'. Because Heading 9013 contains a specific provision for liquid crystal devices, and because the display glass is a liquid crystal device, Heading 9013 prevails over the provision for "parts" found under Heading 8473.

(Slip Op. 96–106)

CPC INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–02–00144

[In this action brought under the court's declaratory judgment jurisdiction over preimportation rulings, 28 U.S.C. § 1581(h), plaintiff contests Customs Service Headquarters Ruling 557994 of October 25, 1994 concerning country of origin marking of certain North American Free Trade Agreement (NAFTA) goods, *viz.*, Canadian-origin peanut slurry that plaintiff proposes to manufacture into peanut butter in the United States. Plaintiff correctly contends that the Ruling is arbitrary and contrary to law because independent of, and in addition to, the hierarchical analysis and application of the NAFTA Marking Rules required by the NAFTA interim Customs regulations 19 C.F.R. § 102.11, § 102.20, and § 134.35(b), Customs was required by 19 U.S.C. § 1304(a) and the substantial transformation rule of *United States v. Gibson-Thomsen Co., Inc.*, 27 CCPA 267, C.A.D. 98 (1940), to consider whether plaintiff would be the "ultimate purchaser" of the imported good. Additionally, the purported abrogation of the *Gibson-Thomsen* rule for NAFTA goods under interim regulation 19 C.F.R. § 134.35(a) is also contrary to Congressional intent under the NAFTA Implementation Act, 19 U.S.C. § 3311 *et seq.*, long-standing judicial construction of 19 U.S.C. § 1304(a), and beyond the scope of Customs' delegated authority under the Act to issue regulations "necessary" to implement the Act. Interim regulation § 134.35(a), therefore, is contrary to law and void, as claimed by plaintiff.

The NAFTA Implementation Act was not intended to abrogate or limit any right under existing law to an exemption from country of origin marking pursuant to 19 U.S.C. § 1304(a) of a finished good based on processing or manufacture of the imported good resulting in "substantial transformation," making the manufacturer the "ultimate purchaser." Defendant's contention that the tariff shift concept of the NAFTA Marking Rules is simply a "codification" of the substantial transformation test based on *Gibson-Thomsen* is rejected since the latter test is case-specific predicated on change in "name, character, and use," while the former test is based on prescribed changes in tariff classification under the HTS, and the two tests may, depending upon the product, have disparate results.

The contested preimportation ruling is remanded to Customs with instructions to address whether plaintiff's proposed United States manufacturing and processing operations for making peanut butter from, among other ingredients, a small portion of Canadian-origin peanut slurry result in "substantial transformation" of the slurry under the *Gibson-Thomsen* factors; and therefore, whether plaintiff would be the "ultimate purchaser" of the slurry within the purview of 19 U.S.C. § 1304(a), as requested by plaintiff.]

(Dated July 8, 1996)

Neville, Peterson & Williams (John M. Peterson, George W. Thompson, and *Arthur K. Purcell*, Esqs.), for plaintiff.

Pillsbury Madison & Sutro (Lynn L. Miller and *James M. Chadwick*, Esqs.) for The Pillsbury Company, *amicus curiae.*

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch; *Jeanne E. Davidson*, Assistant Director *(Rhonda K. Schnare*, Trial Attorney), Civil Division, U.S. Department of Justice, for defendant.

OPINION AND ORDER OF REMAND

INTRODUCTION

NEWMAN, *Senior Judge:* This action raises a significant issue of first impression concerning the country of origin marking of goods.

CPC International, Inc. ("CPC" or "plaintiff"), a major multi-national food producer, proposes to import Canadian-origin peanut slurry[1] to be processed, together with other ingredients, in the manufacture of CPC's "Skippy" brand peanut butter. CPC requested the United States Customs Service ("Customs") to issue a preimportation ruling as to whether its finished peanut butter, containing a small amount of Canadian-origin peanut slurry, must be marked to show Canada as the country of origin pursuant to 19 U.S.C. § 1304(a).

In Headquarters Ruling Letter 557994 of October 25, 1994 ("HRL"), Customs decided the country of origin marking issue adversely to CPC's position that such marking should not be required, which ruling precipitated this action seeking preimportation judicial review.

The Pillsbury Company, another major United States food manufacturer that also imports certain food ingredients, appears in this action as *amicus curiae* in support of CPC.

Briefly, Customs applied its interim amendments to the Customs Regulations implementing the North American Free Trade Agreement Implementation Act of 1993, Pub. L. 103–182, 107 Stat. 2057–2225 (December 8, 1993), *codified at* 19 U.S.C. § 3311 *et seq. See* Executive Order No. 12889, 58 Fed. Reg. 69681 (December 27, 1993)("NAFTA Implementation Act" or the "Act"). The Act approved and entered into force the North American Free Trade Agreement ("NAFTA"), effective January 1, 1994. Customs ruled that under the interim regulations, CPC's retail containers of finished peanut butter, containing but a small quantity of Canadian-origin peanut slurry, do not qualify for the exception from marking under 19 C.F.R. § 134.35(b) and the referenced NAFTA Marking Rules, 19 C.F.R. § 102.20. Applying the hierarchical analysis required by 19 C.F.R. § 102.11, Customs determined in its HRL that CPC's finished product sold at retail must be marked to show it is a "product of Canada."

Plaintiff claims that Customs acted arbitrarily and contrary to law in failing to also address whether the post-importation manufacture of peanut butter from, among other ingredients, a small portion of Canadian slurry results in "substantial transformation" of the slurry under the oft-cited *United States v. Gibson-Thomsen, Co., Inc.*, 27 CCPA 267. C.A.D. 98 (1940) *("Gibson-Thomsen"),* and accordingly, whether CPC would be the "ultimate purchaser" of the imported good under 19 U.S.C. § 1304(a), thereby exempting the finished peanut butter from country of origin marking. Hence, the court must determine whether the *Gibson-Thomsen* substantial transformation test of an ultimate purchaser under 19 U.S.C. § 1304(a) must, in addition to application of the NAFTA exemptions, be considered by Customs in the country of origin marking of finished goods manufactured in the United States from NAFTA goods.

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[1] "Peanut slurry" is a gritty paste made from shelled peanuts that have been roasted, blanched, split and ground.

This action invokes this court's jurisdiction to grant preimportation declaratory relief concerning Customs' rulings pursuant to 28 U.S.C. § 1581(h).[2] Plaintiff moves for judgment on the agency record under CIT Rule 56.1 that the HRL and NAFTA interim regulation 19 C.F.R. § 134.35(a), which limits *Gibson-Thomsen* to articles other than goods of NAFTA countries, are arbitrary and contrary to law, and requests a remand of the ruling to Customs.

BACKGROUND

On January 14, 1992, CPC requested a preimportation ruling as to whether CPC's retail containers of "Skippy" brand peanut butter, to be manufactured at its factory in Little Rock, Arkansas in small part from Canadian-origin peanut slurry, must be marked showing Canada as the country of origin pursuant to 19 U.S.C. § 1304(a), as amended. In support of its request, CPC furnished Customs with its proposed manufacturing process,[3] and relying on the holding of the appellate court in *Gibson-Thomsen,* contended that such process results in a "substantial transformation" of the slurry, and accordingly, exemption from marking of the finished peanut butter as CPC would be the "ultimate purchaser" of the slurry under 19 U.S.C. § 1304(a).

In *Gibson-Thomsen,* the importer challenged Customs' requirement of country of origin marking for certain hairbrushes and toothbrushes made from imported wood brush blocks and toothbrush handles that were to be combined with bristles after importation into the United States to produce finished brushes. The Appellate Court found that the finished brushes were new articles of commerce, distinct from the imported wood handles, the manufacturer of the brushes was the ultimate purchaser of the imported wood brush blocks and toothbrush handles, and therefore, the finished brushes were not subject to country of origin marking under section 1304(a):

> We find nothing in the statute nor in its legislative history to warrant a holding that the Congress intended to require that an imported article, which is to be used in the United States as a material in the manufacture of a *new article having a new name,* charac-

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[2] The basis of the court's exclusive jurisdiction, 28 U.S.C. § 1581(h), reads:

> (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, *marking,* restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation. [Emphasis added.]

At the outset, defendant raised the threshold issue of jurisdiction, and moved to dismiss this action in accordance with CIT Rule 12(b)(1), claiming the court lacks jurisdiction under § 1581(h). In an opinion and order of July 24, 1995, defendant's motion to dismiss was denied. Slip Op. 95–132.

[3] According to CPC, in its request for a ruling it informed Customs that CPC proposes to import Canadian-origin peanut slurry, which following importation a small portion would be blended with slurry made from United States origin peanuts and combined with other domestic ingredients, all of which would then undergo certain manufacturing processes that cause the slurry, both imported and domestic, to acquire significant new commercial attributes in the form of the finished consumer-ready peanut butter. CPC further represented that its post-importation manufacturing operations, to be conducted at plaintiff's manufacturing facility in Little Rock, Arkansas, would result in a change of name, character and use of the slurry *(viz.,* a "substantial transformation"), which would constitute CPC as the "ultimate purchaser" of the imported slurry under 19 U.S.C. § 1304(a) and the principle of *Gibson-Thomsen.*

Defendant has neither conceded nor denied that plaintiff's manufacturing process, as described, results in "substantial transformation" under the *Gibson-Thomsen* test, which is a mixed question of fact and law that the court is not required to decide at this juncture.

> ter and use, and which, when so used, becomes an integral part of the new article, *be so marked as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country.* On the contrary, *we are of the opinion that the Congress intended, by the provisions of Section 304(a)(2), supra, to cover only such imported articles as do not lose their identity as such when combined with other articles.*
>
> *   *   *   *   *   *   *
>
> * * * We are of the opinion, therefore, that, at the time of their importation, the involved articles [the brush blocks and toothbrush handles] were marked "in such manner as to indicate to" *the ultimate purchaser in the United States"—the manufacturer of the toothbrushes and hairbrushes*—the country of origin—Japan.

27 CCPA at 273 (emphasis in part in original).

The courts have consistently followed the new "name, character and use" substantial transformation test of *Gibson-Thomsen* in determining whether imported goods must be marked in accordance with 19 U.S.C. § 1304(a). *See e.g.: Uniroyal, Inc. v. United States,* 702 F. 2d 1022 (Fed. Cir. 1983), *aff'g* 3 CIT 220, 542 F. Supp. 1026 (1982); *National Hand Tool Corp. v. United States,* 16 CIT 308 (1992); *Koru North America v. United States,* 12 CIT 1120, 701 F. Supp. 229 (1988); *Superior Wire v. United States,* 11 CIT 608, 669 F. Supp. 472 (1987); *Ferrostaal Metals Corp. v. United States,* 11 CIT 470, 664 F. Supp. 535 (1987); *National Juice Products Assoc. v. United States,* 10 CIT 48, 628 F. Supp. 978 (1986); *Carlson Furniture Indus. v. United States,* 65 Cust. Ct. 474, C.D. 4126 (1970); *Midwood Indus., Inc. v. United States,* 64 Cust. Ct. 499, C.D. 2046, 313 F. Supp. 951 (1970), *appeal dismissed,* 57 CCPA 141, (1970); and *Grafton Spools, Ltd. v. United States,* 45 Cust. Ct. 16, C.D. 2190 (1960). As observed in *Tropicana Products, Inc. v. United States,* 16 CIT 155, 159, 789 F. Supp. 1154, 1157 (1992), "[s]ubstantial transformation is a concept of major importance in administering the customs and trade laws." Plaintiff insists that the seminal *Gibson-Thomsen* principle, which Customs refused to consider in its HRL, remains alive and well for NAFTA as well as non-NAFTA imports.

Under the Act, 19 U.S.C. § 3311, *et seq.*, Congress approved and entered NAFTA into force under United States law effective January 1, 1994 and the statement of administrative action proposed to implement the Agreement that was submitted to Congress on November 4, 1993.[4] Neither the Act nor the statement of administrative action suggests that there was any intent to amend 19 U.S.C. § 1304(a), except as discussed *infra* in connection with § 1304(a)(3)(H). The Implementation Act, 19 U.S.C. § 3314(a)(2), delegates to the appropriate officers of the United States *(i.e.,* Customs) authority to issue regulations necessary to implement the Act. Customs promulgated implementing interim

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[4] On December 17, 1992, the United States, Canada, and Mexico signed the North American Free Trade Agreement, a trilateral trade preference. The President concluded NAFTA under authority conferred by Congress in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100–418, 102 Stat. 1107–1574. *See* 19 U.S.C. § 2901. United States obligations under NAFTA were implemented in national law by the North American Free Trade Agreement Implementation Act of 1993, Pub. L. 103–182, 107 Stat. 2057–2225 (1993).

amendments to its regulations, Treasury Decisions 94–1 and 94–4, discussed *infra,* effective January 1, 1994, concerning, *inter alia,* marking requirements and country of origin determinations—the NAFTA "Marking Rules."

On April 29, 1994, CPC's initial ruling request of January 14, 1992 was administratively closed at CPC's request. However, on June 21, 1994—following the NAFTA Implementation Act and promulgation of new interim amendments to the Customs Regulations—CPC by letter reiterated its request for a ruling as to whether the manufacture of peanut butter in the United States would result in a "substantial transformation" of the Canadian peanut slurry, and whether on that basis CPC would be the "ultimate purchaser" of the slurry thereby exempting the finished peanut butter from marking pursuant to 19 U.S.C. § 1304(a).

Applying the NAFTA Rules of Origin, 19 C.F.R. Part 102, Subpart B, Customs employed the "hierarchical analysis" required by 19 C.F.R. § 102.11, and the interim marking regulations, 19 C.F.R. Part 134, including § 134.35(b), which regulation excepts from country of origin marking a finished good where the processing of the imported good in the United States "would result in the [finished] good becoming a good of the United States under the NAFTA Marking Rules." *Inter alia,* Customs ruled: "[s]ince the peanut slurry that will be imported is a good of a NAFTA country (Canada) when imported into the United States, the country of origin marking requirements of the finished peanut butter *will be based on the determination of whether the processing in the United States would cause the final product to be of United States origin pursuant to the NAFTA marking rules"* (emphasis added). Continuing, Customs ruled: "the processing in the United States does not result in the peanut butter becoming a good of the United States under NAFTA Marking Rules, [and] the Section 134.35(b) exception from the marking requirement does not apply. The retail container of the finished product that reaches the ultimate purchaser must be marked to reflect Canada as the country of origin." HRL 557994 at 4.

Specifically, Customs reasoned that since the processing of the Canadian-origin peanut slurry into finished peanut butter would not result in the required change in classification or "tariff shift" under the NAFTA "Marking Rules," 19 C.F.R. § § 102.11(a)(3) and 102.20,[5] the finished good would not be "a good of the United States"; and that the "essential character" of the finished product within the purview of

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[5] With respect to peanut butter, which is classified in heading 2008.11, HTSUS, the applicable interim NAFTA Marking Rule requires the following change in classification:

2008.11 A change to subheading 2008.11 from any other chapter, provided that the change is not the result of mere blanching of nuts.

Customs ruled that Canadian peanut slurry is classifiable under subheading 2008.11.90, HTSUS, and the finished peanut butter is classifiable under subheading 2008.11.10, HTSUS, and hence the "tariff shift" requirements for subheading 2008.11 are not met. This aspect of the HRL is not contested by plaintiff.

§ 102.11(b) is imparted by the imported and domestic peanut slurry.[6] Accordingly, based *solely* upon its hierarchical analysis under the interim regulations, including application of the Marking Rules, and without addressing whether or not CPC would be the ultimate purchaser of the Canadian peanut slurry under § 19 U.S.C. § 1304(a) pursuant to the substantial transformation test of *Gibson-Thomsen,* Customs ruled that CPC's retail containers of finished peanut butter containing Canadian-origin peanut slurry must be marked to show that the finished article is a "product of Canada". HRL 557994 at 4.

In failing to address the issue of substantial transformation raised by CPC, Customs ostensibly applied its interim regulation 19 C.F.R. § 134.35(a) that abolished the *Gibson-Thomsen* rule for NAFTA goods, which is essentially the gravamen of plaintiff's complaint and request for relief.

Specifically, CPC requests a judgment holding the HRL to be arbitrary and contrary to law to the extent that, after applying the hierarchical analysis referred to above and determining that plaintiff's proposed processing of the Canadian slurry into finished peanut butter does not result in the prescribed tariff shift under the Marking Rules, as required by the exception to marking under 19 C.F.R. § 134.35(b), Customs failed or refused to additionally address whether, as an independent basis for exemption from marking, CPC would be the ultimate purchaser of the peanut slurry under the *Gibson-Thomsen* substantial transformation rule.

Plaintiff also seeks a declaratory judgment that 19 C.F.R. § 134.35(a) impermissibly limits *Gibson-Thomsen* to imports from non-NAFTA countries, and is therefore arbitrary and contrary to law. Plaintiff requests that the court remand the HRL to Customs with instructions to consider whether plaintiff's post-importation processing of the Canadian peanut slurry meets the requirements of the *Gibson-Thomsen* substantial transformation factors.

Amicus curiae, The Pillsbury Company, has filed briefs in support of essentially the same position and contentions urged by CPC.

DISCUSSION

I

The key issue is whether the Congressional approval of NAFTA under the Implementation Act, including an obligation of the Parties under NAFTA to establish rules of origin, or so-called "Marking Rules," and certain exemptions from marking specified under NAFTA Annex 311(5)(b), abrogated and replaced for NAFTA goods imported into the

[6] Customs determined that since none of the provisions of § 102.11(a) yields a country of origin determination, including a change in tariff classification under § 102.20, Customs was then required as part of the required hierarchical analysis under the Rules of Origin to invoke the provisions of § 102.11(b), which focus on the single material that imparts the "essential character" of the good to determine the country of origin. Section 102.18(b)(2) provides that only materials (domestic and foreign) that do not undergo a tariff shift are to be taken into consideration in determining the essential character of a good and that the imported and domestic peanut slurry impart the essential character of the finished peanut butter. Plaintiff does not contest Customs' determination that the peanut slurry (domestic and foreign) impart the essential character to the finished peanut butter.

United States the *Gibson-Thomsen* substantial transformation test for determining who is the "ultimate purchaser" of goods under § 1304(a).

The court concludes:

(a) While Congress authorized issuance of regulations necessary to implement the Act (which approved NAFTA), including establishment of the Marking Rules, Congress did not intend that Customs abolish the long-standing *Gibson-Thomsen* substantial transformation test for the ultimate purchaser provision of § 1304(a) for NAFTA goods. Rather, Congress intended that the Appellate Court's interpretation of the ultimate purchaser provision of § 1304(a) in *Gibson-Thomsen* should remain in full force and effect as a case-specific test *in addition to and independent of* the application of the NAFTA Marking Rules and NAFTA exemptions from marking based on those rules;

(b) interim regulation § 134.35(a), purporting to abrogate the *Gibson-Thomsen* test for NAFTA goods, is contrary to Congressional intent under the NAFTA Implementation Act to preserve the long-standing substantial transformation test, while at the same time implementing the new NAFTA Marking Rules and NAFTA marking exemptions based on those rules;

(c) interim regulation § 134.35(a) is outside the scope of Customs' delegated authority under 19 U.S.C. § 3314 because the abrogation of *Gibson-Thomsen* for NAFTA goods was not only contrary to Congressional intent to preserve the test for NAFTA goods, but was unnecessary to implement the Act and new NAFTA Marking Rules or to comply with a Party's obligations under the Agreement;

(d) while recognizing Congressional approval under the Act of establishment of Marking Rules and exemptions from marking under NAFTA Annex 311, continuity following the Act of the application of *Gibson-Thomsen* as an *independent alternative* test to application of the Marking Rules as a basis for exemption from marking avoids contravention by Customs of 19 U.S.C. § 3312(a) and 19 U.S.C. § 1304(a);

(e) based on the foregoing, the court holds that the HRL and interim regulation § 134.35(a) are arbitrary and otherwise not in accordance with law. 28 U.S.C. § 2640(d); 5 U.S.C. § 706(2)(A); *National Juice Products,* 10 CIT at 62, 628 F. Supp. at 991.

II

The basic statutory framework for country of origin marking, 19 U.S.C. § 1304, as amended, was unchanged by the NAFTA Implementation Act (except as indicated *infra).* Section 1304(a) so far as relevant, provides: "Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked * * * in such manner as to indicate to an *ultimate purchaser* in the United States the English name of the country of origin of the article." (Emphasis added.)

Section 1304(a), neither prior to nor following the Act, provided a definition of "ultimate purchaser," thus leaving the specific implementation of the provision to administrative and judicial interpretation.

Notwithstanding that identifying the "ultimate purchaser" of an imported good is a pivotal inquiry in the administration of country of origin marking pursuant to § 1304(a), it is not surprising that given the variable circumstances under which the term must be applied, Congress has never attempted to provide a definition of the term. It is plaintiff's position, and the court agrees, that the Act approving NAFTA made no change in the judicial definition of an ultimate purchaser under § 1304(a) in accordance with the *Gibson-Thomsen* substantial transformation test. Indeed, as stressed elsewhere in this opinion, the Implementation Act merely broadened the application of the ultimate purchaser provision under 19 U.S.C. § 1304(a)(3)(H) by amending the statute's standard of knowledge for NAFTA goods.

Illuminating the complexity of the necessary factual and legal analyses arising from the use in the statute of the term "ultimate purchaser" are the following observations by Customs:

> It is not feasible to state who will be the "ultimate purchaser" in every circumstance. Broadly stated, an "ultimate purchaser" may be defined as the last person in the United States who will receive the article in the form in which it was imported. If an imported article will be used in manufacture, the manufacturer is the "ultimate purchaser." If an article is to be sold at retail in its imported form, the purchaser at retail is the "ultimate purchaser." A person who subjects an imported article to a process which results in a substantial transformation of the article, even though the process may not result in a new or different article, may be an "ultimate purchaser" in certain circumstances; but if the process is merely a minor one which leaves the identity of the imported article intact, the consumer or user of the article, who purchases it after processing, will be regarded as the "ultimate purchaser."

18 Fed. Reg. 5419 (September 9, 1953). *See also* interim regulation 19 C.F.R. § 134.1(d) (1995) setting forth various examples of who will be the ultimate purchaser, both under a substantial transformation analysis and under the tariff shift rules.

"The country of origin marking statute was intended, *inter alia,* 'to facilitate consumer purchasing decisions * * *' (citation omitted). By indicating to consumers where a product was manufactured, the statute helps informed and discriminating buyers decide either to 'buy or refuse to buy [a product] * * *if such markings should influence [their] will'." (citation omitted). *Koru North America v. United States,* 12 CIT at 1126, 701 F. Supp. at 234. *See also, United States v. Friedlaender & Co.,* 27 CCPA 297, 302, C.A.D. 104 (1940).

III

In addition to the basic statutory framework for country of origin marking under 19 U.S.C. § 1304, the NAFTA Implementation Act, *inter alia,* approved Annex 311(1) under which the NAFTA Parties were to "establish by January 1, 1994, *rules for determining whether a good is a good of a Party* ("Marking Rules") *for purposes of this Annex"* (emphasis added) and for other purposes. Further, under NAFTA Annex 311(2),

the Parties could "require that *a good of another Party, as determined in accordance with the Marking Rules,* bear a country of origin marking, when imported into its territory, that indicates to the *ultimate purchaser* of that good the name of its country of origin." (Emphasis added.) However, under Annex 311(5)(b) the Parties were obligated to exempt from country of origin marking goods meeting certain conditions. Particularly pertinent to the issues in this case is the marking exemption under Annex 311(5)(b)(viii), which provides:

5. Each Party shall:

> (b) exempt from a country of origin marking requirement a good of another Party that
>
> > (viii) is to undergo production in the territory of the importing Party by the importer, or on its behalf, in a manner that would result in the good becoming a good of the importing Party under the Marking Rules.

Also, in accordance with Annex 311(5)(b)(ix), each Party was obligated to exempt from marking a good of another Party that "by reason of its character, or the circumstances of its importation, the *ultimate purchaser* would reasonably know its country of origin even though it is not marked" (emphasis added). *For purposes of the Annex* "ultimate purchaser means the last person in the territory of an importing Party that purchases the good in the form in which it was imported; * * * ." Annex 311(11) (emphasis added). The term "the form in which it was imported" means the condition of the good before it has undergone one of the changes in tariff classification described in the "Marking Rules." (Emphasis added.) *Id.* There is no suggestion whatever in the Agreement that in addition to the exemptions listed in Annex 311(5)(b), the Parties would be precluded from continuing their existing exemptions from marking or even from providing exemptions from marking in addition to those specified in Annex 311(5)(b).

Plaintiff does not challenge the implementation by Customs of NAFTA Marking Rules for country of origin determinations or as the basis for exceptions from marking; further, plaintiff does not contest Customs' implementation of the Marking Rules in conformance with the change in tariff classification methodology. Simply put, plaintiff argues, and the court agrees, that exemptions from marking based on the Marking Rules approved by the Implementation Act did not supplant the *Gibson-Thomsen* judicial interpretation of "ultimate purchaser" under the basic statute, § 1304(a) in accordance with the substantial transformation test, which remains intact for NAFTA goods *in addition to* the marking exemptions based on the Marking Rules.

IV

While the Act itself entered NAFTA into force as part of United States law, the provisions of the Act itself as well as NAFTA's provisions for establishment of Marking Rules and exemptions from marking were implemented by interim regulations issued by Customs pursuant to 19 U.S.C. § 3314.

Specifically, in accordance with T.D. 94–4 (59 Fed. Reg. 110, Jan. 3, 1994) Customs added a new Part 102 to Title 19 of the Customs Regulations, which sets forth the Rules of Origin, or "Marking Rules," for determining whether an imported good is a good of a NAFTA Party. Section 102.11 sets forth the general rules for determining country of origin, whereas § 102.20 contains the specific change in tariff classification rules referenced in § 102.11 based on chapters of the Harmonized Tariff Schedule of the United States ("HTSUS").

Country of origin marking requirements for NAFTA goods and exceptions from marking were promulgated in T.D. 94–1 (58 Fed. Reg. 69460, December 30, 1993), and are set forth in interim amendments to various provisions of Title 19, Part 134, Customs Regulations, particularly § 134.35(a) and (b). Customs observed in T.D. 94–1 that the NAFTA Parties "in view of the different existing customs legal and procedural requirements * * * agreed to use a standards approach whereby agreement was reached on *certain minimum principles* to be reflected in each Party's regulations * * *" (emphasis added).

The genesis of § 134.35(a) and (b), the application of which is central to the issue presented, is as follows. As early as 1953, the Secretary of the Treasury amended the Customs Regulations to administratively codify the principle of *Gibson-Thomsen* in 19 C.F.R. § 11.8(e) (1953). T.D. 53336 (Sept. 9, 1953). In 1972, Customs renumbered the regulation as § 134.35, T.D. 72–262, 37 Fed. Reg. 20321 (Sept. 29, 1972); and as indicated *infra,* at the time of issuance of the HRL, the *Gibson-Thomsen* regulation was again renumbered as 19 C.F.R. § 134.35(a)(1994).

At the time of CPC's initial request for a ruling, 19 C.F.R. § 134.35 (1993) provided:

> **134.35 Articles substantially changed by manufacture.**
>
> An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision of the case of United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of Section 304(a), Tariff Act of 1930, as amended, 19 U.S.C. § 1304(a), and the article shall be excepted from marking. The outermost container of the imported article shall be marked in accord with this part.

19 C.F.R. § 134.35 (1993).

Following Congressional approval of NAFTA under the Implementation Act, the text of § 134.35 (1993), *supra,* was redesignated as subsection (a) and prefaced, *"Articles other than goods of a NAFTA country."* The new subsection (a) under § 134.35 essentially purports to abrogate for NAFTA goods the *Gibson-Thomsen* test of an ultimate purchaser under § 1304(a). T.D. 94–1, *supra.*

Subsection (b) of § 134.35, prefaced as *"Goods of a NAFTA country,"* excepting from marking NAFTA goods to be processed in the United States which become a good of the United States pursuant to the NAFTA Marking Rules, is predicated on NAFTA Annex 311(5)(b)(viii), which similarly is based on the Marking Rules. Unlike subsection (a) which specifically mentions the ultimate purchaser provision of § 1304(a) as construed in *Gibson-Thomsen,* subsection (b) makes no reference to implementing the ultimate purchaser provision of the statute or implementing the statute in any manner, and the exception reflects only an implementation of NAFTA's Annex 311(5)(b)(viii) exemption from marking based on the Marking Rules.

Plaintiff does not dispute that 134.35(b) validly implements the exemption from marking under Annex 311(5)(b)(viii), or that its finished peanut butter does not meet the prescribed change in tariff classification pursuant to the Marking Rules, 19 C.F.R. § 102.20, for the marking exception under § 134.35(b). However, plaintiff maintains that *in addition to* addressing the hierarchical analysis required by § 102.11 and the exception from marking under 19 C.F.R. § 134.35(b) predicated on the rules of origin under § 102.20, Customs was required to *independently* consider on a case-specific basis whether plaintiff's proposed processing of the slurry in the United States would meet the *Gibson-Thomsen* substantial transformation test. Consequently, according to plaintiff, the HRL is arbitrary and contrary to law because Customs failed to consider whether, based upon the processing of the slurry in the United States into peanut butter, plaintiff would be the "ultimate purchaser" under § 1304(a) predicated on substantial transformation of the slurry. In the same vein, plaintiff challenges the validity of 19 C.F.R. § 134.35(a) on the ground that the interim regulation impermissibly precludes the application of the *Gibson-Thomsen* test to NAFTA goods.

The court must agree with plaintiff's contentions. Clearly, in implementing the Act by regulations pursuant to § 3314(a) it was neither "necessary" nor "appropriate" for Customs to abrogate the application of *Gibson-Thomsen* for NAFTA goods pursuant to 19 C.F.R. § 134.35(a), and therefore, in issuing that interim regulation Customs contravened the intent of Congress under the Act in approving NAFTA and exceeded Customs' delegated authority.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 208 (1988). *Accord, Lyng v. Payne,* 476 U.S. 926, 937 (1986). *See also, Killip v. Office of Personnel Management,* 991 F.2d 1564, 1569 (Fed. Cir. 1993). Therefore, if regulations issued by an agency are inconsistent with the statutory authority underlying them, they are invalid. *United States v. Larionoff,* 431 U.S. 864, 873 (1977) (Department of Defense regulations that would have operated to deny enhanced reenlistment bonuses to a

certain class of reenlisting servicemen contravened Congressional purpose of underlying statute and hence were held invalid).

Fundamentally, it must be presumed that when Congress approved the NAFTA Agreement, Congress was well aware of *Gibson-Thomsen* and the long line of judicial authority and regulations codifying the "name, character or use" substantial transformation test, which had been long applied to 19 U.S.C. § 1304(a) judicially and administratively in determining whether the manufacturer or processor was the ultimate purchaser of the imported good. Significantly, however, upon Congress' approval of the Agreement under the Implementation Act, NAFTA did not obligate the United States to replace its well established *Gibson-Thomsen* substantial transformation test for an ultimate purchaser under § 1304(a), Congress did not do so under the Implementation Act, and Congress did not intend to delegate the authority to do so to Customs.

The Senate Report which accompanied the NAFTA Implementation Act suggests quite the contrary, and notes that § 207(a) of that Act "authorizes, for NAFTA-origin goods, certain *additional exemptions* from the marking requirements of Section 304." S. Rep. No. 103–189, 103d Cong., 1st Sess. 23 (1993). The foregoing statement in the Senate Report is obviously not dispositive, but does suggest the continued application of *existing exemptions,* which included the ultimate purchaser provision of § 1304(a) as construed in *Gibson-Thomsen.* The court must agree with plaintiff that Congress intended that the NAFTA marking exemptions under Annex 311(5)(b) based on the Marking Rules should represent a standard minimum exemption framework to which all the NAFTA Parties were obligated to adhere, which Marking Rule exemptions when implemented and applied by Customs *in addition to* the existing substantial transformation test of an ultimate purchaser under § 1304(a) would provide NAFTA goods with an advantageous marking exemption framework over non-NAFTA goods to which, of course, the Marking Rules do not apply.

The court must also agree with *amicus'* contention, citing H.R. Rep. No. 103–361, 103rd Cong., 1st Sess., Part I at 8–9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2558–59, that the unmistakable purpose of NAFTA is to *eliminate* trade barriers, *not to create them.* Hence, NAFTA through the Implementation Act introduced into United States law new or additional exemptions from marking for NAFTA goods while continuing existing exceptions in full force and effect. Indeed, for NAFTA goods Congress expressly broadened the ultimate purchaser exception under 19 U.S.C. § 1304(a)(3)(H), pursuant to § 207(a)(4) of the Implementation Act, in conformity with the exemption under Annex 311(5)(b)(ix).[7]

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[7] As aptly pointed out by *amicus*, marking requirements constitute one barrier to trade that Congress specifically intended to ameliorate under the Implementation Act by expressly amending 19 U.S.C. § 1304(a)(3)(H) thus broadening the standard of knowledge respecting the "ultimate purchaser," thus adding subsection (h) to the basic marking statute. This amendment aimed at broadening the application of the § 1304(a)(3)(H) ultimate purchaser exception from marking of NAFTA goods is the direct antithesis of any Congressional intent to abrogate for NAFTA goods the ultimate purchaser exemption under § 1304(a) based on the *Gibson-Thomsen* substantial transformation test.

Having thus facilitated and broadened the application of the ultimate purchaser exception for NAFTA goods under § 1304(a)(3)(H), it is most unlikely that under the Implementation Act Congress intended to abolish the long-standing application of the *Gibson-Thomsen* substantial transformation test to the ultimate purchaser of NAFTA goods in conformance with § 1304(a). Accordingly, the court determines that interim regulation § 134.35(a) contravenes Congressional intent under the Implementation Act and is outside the scope of the agency's authority to issue regulations "necessary" to implement the Act.

V

Citing 19 U.S.C. § 3312(a),[8] plaintiff argues against any application to plaintiff of the NAFTA Marking Rules or exemptions from marking under Annex 311 in a manner that would eliminate the existing judicial interpretation of the ultimate purchaser provision under § 1304(a). In essence, plaintiff argues that denial of an exemption from marking based solely on consideration of the interim regulations, including the Marking Rules, would be inconsistent with § 1304(a) unless Customs gives due consideration on a case-specific basis to whether manufacture of the peanut butter in the United States results in substantial transformation of the Canadian slurry under the *Gibson-Thomsen* factors, and hence whether plaintiff is the ultimate purchaser of the slurry within the purview of § 1304(a). Such inconsistency results from the fact that unlike the tariff shift approach of the Marking Rules in the application of 19 C.F.R. § 134.35(b), "[t]o determine whether a substantial transformation of an article has occurred for purpose of ascertaining who is the 'ultimate purchaser' each case must be decided on its own particular facts," *Uniroyal, Inc.*, 16 CIT at 224, 542 F. Supp. at 1029, and must be based on the totality of the evidence. *Ferrostaal Metals,* 664 F. Supp. at 541. As observed in *Koru,* 701 F. Supp. at 234, n.9, "[t]he plethora of tests results from the cases on substantial transformation being 'very product specific and * * * often distinguishable on that basis, rather than by their statutory underpinnings.' *Courts have not adhered rigidly to a single test [to yield a substantial transformation] because of 'the importance of focusing on the facts of each case'.* * * * Courts find it 'difficult to take concepts applicable to products such as textiles and

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[8] So far as pertinent, that provision of the NAFTA Implementation Act reads:

§ 3312 Relationship of the Agreement to United States and State Law

(a) Relationship of Agreement to United States law

(1) United States law to prevail in Conflict

No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed—

(A) to amend or modify any law of the United States * * * unless specifically provided for in this Act.

apply them to combinations of liquids or fabrication of steel articles." (citations omitted.) (emphasis added.)[9]

Plaintiff further points up the prohibition under § 3312(a) that nothing in the Act shall be construed to amend or modify existing law of the United States, "unless specifically provided for in this Act." Significantly, when Congress under the Implementation Act intended to amend or modify § 1304, it did so expressly, as in § 207(a)(4), which by adding subsection (h) to § 1304 broadened the standard of knowledge for the ultimate purchaser under the marking exception in 19 U.S.C. § 1304(a)(3)(H). However, nothing in the Implementation Act suggests that Congress intended to amend to amend § 1304(a) for NAFTA goods by replacing the *Gibson-Thomsen* rule for determining whether the manufacturer or processor is the ultimate purchaser of the imported article. Defendant, apparently recognizing the difficulty of its position in light of the § 3312(a) constraints on the impact of the Agreement and the Act on existing law if the tariff shift methodology were applied in a manner inconsistent with the case-specific "name, character, and use" substantial transformation test of *Gibson-Thomsen,* goes to great lengths to rationalize that the tariff shift concept is *not* a replacement of the traditional substantial transformation rule, but is really nothing more than a "reflection" or "codification" of the rule.[10]

However, it is quite apparent to the court that the *Gibson-Thomsen* substantial transformation test of an ultimate purchaser under § 1304(a) is indisputedly so methodologically distinct from the change in classification format of the Marking Rules applied under § 134.35(b) as to make a mockery of the use of the term "codification." In any event, whether or not the term "codified" is the apt term to apply to the affect of the tariff shift rules on the *Gibson-Thomsen* test, Congress expressly intended under 19 U.S.C. § 3312(a) to avoid a conflicting application of NAFTA or the Act with existing United States law, except where the Act expressly amends or modifies the existing law.

Unless the potentially conflicting methodologies may coexist and traditional substantial transformation be applied to NAFTA goods in addition to and independently of the tariff shift rules, the latter may run afoul of the Act's prohibitions under 19 U.S.C. § 3312(a).

In point of fact, Customs itself has frequently had occasion to contrast traditional substantial transformation with the change in classification

[9] An analysis of the case law reveals that the courts have applied several tests under the rubric of "substantial transformation." Of course, the most significant is the "name, character, or use" test. *Koru North America,* 12 CIT at 1126, 701 F. Supp. at 234, citing *Anheuser-Busch Brewing Ass'n v. United States,* 207 U.S. 556 (1907) and *Gibson-Thomsen. Koru* notes that three other tests are manifest from caselaw: (1) the "article of commerce" test; (2) the "essence" test; and (3) the "value added" test. *See Id.* at 234, n.9 and cases cited. It is also noteworthy that in *Gibson-Thomsen,* 27 CCPA at 273, the court held that substantial transformation occurs when an article acquires a "new name, character, *and* use." (emphasis added.) Even this test has long been liberalized by the courts and administratively applied more flexibly by requiring a "new name, character, *or* use." *Koru,* 12 CIT at 1126, 701 F. Supp. at 234.

[10] Thus, defendant emphasizes that on May 5, 1995 Customs published in the Federal Register specific examples of the process by which judicial decisions concerning substantial transformation were taken into account in establishing the tariff shift rules. 60 Fed. Reg. 22312, 22314–22330 (May 5, 1995). Further, defendant stresses that the new Marking Rules are intended to "provide the results that would be reached under the case-by-case application of the substantial transformation rule * * * ." 59 Fed. Reg. 141, 142 (January 3, 1994). On the other hand, in T.D. 94-4 Customs disclosed that the tariff shift concept "was specifically developed as an *alternative to the traditional substantial transformation rule"* in order to obviate various problems in origin determinations and is *intended to eliminate* the difficulties encountered in the "case-specific" criteria imposed by substantial transformation.

concept. For example, at the time Customs published the interim NAFTA Marking Rules, the agency also issued a *Notice of Proposed Rulemaking* in which it proposed to adopt the NAFTA Marking Rules under 19 C.F.R. 102 as a universal country of origin regulation, to govern origin determinations for all goods from all foreign sources. 59 Fed. Reg. 141 (Jan. 3, 1994). Customs at that time proposed amending 19 C.F.R. § 134.35 to completely eliminate the *Gibson-Thomsen* test as an exception to marking, and to instead provide that the goods would be exempt from marking only if, by reason of post-importation manufacturing or processing, they became a "good of the importing Party" pursuant to the NAFTA Marking Rules. In its proposal to adopt the NAFTA Marking Rules as a universal country of origin regimen, Customs observed:

> Notwithstanding the long history of the substantial transformation rule, its administration has not been without problems. These problems devolve from the fact that application of the substantial transformation rule is on a case-by-case basis and often involves subjective judgments as to what constitutes a new and different article or as to whether processing has resulted in a new name, character and use * * * The very fact that the substantial transformation rule has been the subject of a large number of judicial and administrative determinations is testament to the basic problems: the case-by-case approach, involving application of the rule based on specific sets of facts, has led to varied case-specific interpretations of the basic rule, resulting in a lack of predictability which in turn has engendered a significant degree of uncertainty, both within Customs and in the trade community as regards the effect that a particular type of processing should have an origin determination.
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> * * * * * * *
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> The change in tariff classification standard was specifically developed as an alternative to the traditional substantial transformation rule in order to obviate the problems described above. Customs believes that rules based upon the change in tariff classification approach, would provide by virtue of their greater specificity, more objectivity, transparency, and predictability in origin determinations. * * *

59 Fed. Reg. 141, 142.

That traditional substantial transformation and the tariff shift rules[11] stand as separate, independent methodologies even under the Marking Rules, is pointed up by certain rules of origin under 19 C.F.R.

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[11] In that regard, plaintiff cites examples of obvious substantial transformations of goods into new articles having a new name, character and use, that would nonetheless fail the tariff shift test, leading to absurd results. Fundamentally, statutory interpretation should avoid reaching absurd results, as presumably Congress would not have intended such results. *Amicus* also devotes a substantial portion of its memorandum of law to illustrate the internal inconsistency, disparate, arbitrary, and anomalous results reached under the Marking Rules and hierarchy set out in 19 C.F.R. § 102.11 for certain food products, other than peanut butter, resulting from the disregard of substantial transformation and reliance solely on prescribed tariff shifts. As previously noted, even when applying the traditional methodology, the courts have employed a plethora of substantial transformation formats under case-specific analyses to achieve a rational flexibility and to avoid reaching absurd results with regard to certain products. It is apparent that the rigidity of the change in classification concept of the Marking Rules, as expeditious and efficient as that approach may be for origin determinations, may produce results as anomalous as a rigid application of the traditional "name, character, and use" test regardless of the product.

§ 102.20 wherein Customs *by administrative choice* uses a *dual approach* requiring that the prescribed tariff shift must *also* result in a substantial transformation. For purposes of such rules, "substantial transformation" is, not surprisingly, defined in 19 C.F.R. § 102.1(p) to mean "production which results in a new and different article, with a new name, character and use." Hence, under § 102.20 for certain HTSUS chapters, Customs must apply traditional substantial transformation *in addition to* specific tariff shifts.[12]

The Marking Rules' requirement that certain tariff shifts must also result in substantial transformation in the traditional sense underscores the significant distinction in the two approaches, and at the same time highlights the apparent recognition by Customs of the desirability or necessity for, in addition to the change in tariff classification concept, applying the traditional substantial transformation methodology under existing law for certain products. Surely, then, it is inconsistent with existing law and Customs' own dual tariff shift/substantial transformation approach under certain Marking Rules, as described above, for Customs to have otherwise abrogated the application of the traditional *Gibson-Thomsen* substantial transformation approach for NAFTA goods under § 134.35(a) and now assert to the court that the NAFTA rules "codify" such approach.

VI

Plaintiff's initial memorandum of law sought an exception from marking under the "ultimate purchaser" provision of 19 U.S.C. § 1304(a)(3)(H) and § 1304(h) based on *Gibson-Thomsen*. The Government replied, correctly, that *Gibson-Thomsen* did not construe § 1304(a)(3)(H), but rather § 1304(a), and in any event the ultimate purchaser of the slurry for purposes of § 1304(a)(3)(H) would be the retail consumer of the finished peanut butter, not CPC.

In its reply brief and at oral argument plaintiff withdrew its claim for an exception from marking as the ultimate purchaser under 19 U.S.C. § 1304(a)(3)(H), and instead focused the substantial transformation test under the principle of *Gibson-Thomsen* on the ultimate purchaser provision of § 1304(a). As previously indicated, under the *Gibson-Thomsen* rule, if imported materials are processed into a finished article, resulting in substantial transformation of the imported good, the finished good is exempt from country of origin marking because the manufacturer is the "ultimate purchaser" of the imported good within the purview of § 1304(a). Further, plaintiff, who proposes to manufacture peanut butter from imported slurry, makes no claim for an ultimate purchaser exception to marking under § 1304(a)(3)(H) based on

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[12] For example, the NAFTA Marking Rule for HTS heading 1901.90 requires: A change to subheading 1901.90 from any other heading, or; a change to a product of subheading 1901.90 from any other product within heading 19.01 *if that change results in a substantial transformation.* (Emphasis added.) Additionally, Customs has prescribed certain other *tariff shifts under the Marking Rules that must constitute a traditional substantial transformation,* including HTS headings 2103.90, 4823.20 through 4823.59, 4823.70 through 4823.90, 6811.90, 6812.90, 6814.90, 7010 through 7018, 7019.90, 7020, 8708.99, 9010, 9401.90, 9403.90 and 9606.21 through 9606.29. 19 C.F.R. § 102.20.

Interestingly, Customs may have second thoughts concerning the continued use of traditional substantial transformation for its NAFTA rules of origin. *See Notice of Proposed Rulemaking,* 60 Fed. Reg. 22312 (May 5, 1995).

whether the retail purchaser of the finished peanut butter meets the standard of knowledge under §1304(h).

CONCLUSION

In approving NAFTA under the Implementation Act, Congress had no intent to overrule or abrogate the *Gibson-Thomsen* substantial transformation test of an ultimate purchaser under 19 U.S.C. § 1304(a) for NAFTA goods, did not do so expressly under the Act, and did not grant Customs authority to do so by interim regulation. Customs' interim regulation § 134.35(a), purporting to abrogate the *Gibson-Thomsen* rule for NAFTA goods, contravenes Congressional intent, exceeds Customs' authority to promulgate regulations necessary to implement the Act, and therefore is arbitrary and otherwise not in accordance with law. Customs' HRL, which failed to address the *Gibson-Thomsen* substantial transformation factors in addition to the NAFTA exception and Marking Rules, is also arbitrary and contrary to law.

In view of the foregoing conclusions, the HRL is remanded to Customs for consideration of whether plaintiff would be the ultimate purchaser of the Canadian slurry under 19 U.S.C. § 1304(a) in accordance with the *Gibson-Thomsen* substantial transformation factors.

Customs shall submit the results of remand to the court and serve counsel for the respective parties within forty-five (45) days of the service of this order. Plaintiff and *amicus* may respond to the remand results within thirty (30) days of issuance; defendant may reply to such response within thirty (30) days of service.

(Slip Op. 96–107)

XEROX CORP., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 94–05–00286

[Plaintiff's motion for rehearing denied.]

(Dated July 9, 1996)

Neville, Peterson & Williams (John M. Peterson) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Civil Division, United States Department of Justice *(Barbara M. Epstein)* for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* This matter comes before the Court on plaintiff's motion for rehearing of its earlier request to vacate dismissal and suspend this case. Defendant does not object to plaintiff's motion, but defers to the Court's discretion as to whether to grant the motion. After due deliberation, the Court denies plaintiff's motion.

BACKGROUND

This case was placed on the Court's reserve calendar on May 18, 1994. Because plaintiff never removed the case from the reserve calendar, the Clerk dismissed the case for lack of prosecution, pursuant to USCIT Rule 83(c), on January 24, 1996. On March 28, 1996, plaintiff made a motion to vacate the dismissal and suspend the case. Plaintiff failed, however, to present any facts to convince the Court that dismissal of this case was unwarranted. On April 19, 1996, the Court denied plaintiff's motion to vacate dismissal and suspend. *Xerox Corp. v. United States,* slip op. 96–66 (April 19, 1996).

DISCUSSION

Plaintiff asks the Court to rehear and reconsider plaintiff's earlier motion to vacate dismissal and suspend this case.

The decision to grant a motion for rehearing rests in the sound discretion of the Court. USCIT Rule 59(a); *Kerr-McGee Chem. Corp. v. United States,* 14 CIT 582, 583 (1990). A rehearing should not, however, be granted merely to give a party a chance to relitigate its case. *Id.* Rather, a rehearing may be appropriate when the original proceeding was significantly flawed. *Id.* The original proceeding may have been significantly flawed if it suffered from: (1) an error or irregularity; (2) a serious evidentiary flaw; (3) the absence of new evidence which even a diligent party could not have discovered at the time; or (4) an accident, unpredictable surprise, or unavoidable mistake that impaired a party's ability to present its case. *Id.*

Plaintiff has failed to establish an appropriate basis for granting a rehearing in this case. Plaintiff seeks a rehearing because it wants a second chance to show the Court the extent to which it prosecuted this case. Plaintiff has not, however, recently discovered the facts that it seeks to present. When plaintiff made its motion to vacate the dismissal for lack of prosecution, plaintiff chose not to make the showing that it seeks to make today. The Court will not grant a rehearing merely to give plaintiff an opportunity to relitigate its case. Consequently, it is hereby

ORDERED that plaintiff's motion for rehearing and reconsideration is DENIED.

(Slip Op. 96–108)

FAG KUGELFISCHER GEORG SCHAFER KGAA, FAG ITALIA S.P.A., FAG (U.K.) LTD., BARDEN CORP. (U.K.) LTD., FAG BEARINGS CORP., AND BARDEN CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, FEDERAL-MOGUL CORP., TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00493

Plaintiffs move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record challenging aspects of the final determination by the Department of Commerce, International Trade Administration ("Commerce"), entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order,* 58 Fed. Reg. 39,729 (1993). Specifically, plaintiffs allege that Commerce committed the following errors: (1) based assessment rate on calculated entered values rather than on actual entered values; (2) included sales of certain needle roller bearings in the final margin calculation for cylindrical roller bearing sales; (3) added an eight percent profit amount as best information available ("BIA") to the actual cost of related party inputs; (4) calculated a merged dumping margin for FAG (U.K.) Limited and Barden Corporation (U.K.) Limited; (5) deducted U.S. direct selling expenses from exporter's sales price ("ESP") rather than adding them to foreign market value ("FMV"); and (6) committed a clerical error.

Held: The Court grants plaintiffs' motion for judgment on the agency record to the extent that it finds that the following actions by Commerce were not in accordance with law: (1) application of BIA to related party inputs of FAG Italia S.p.A.; (2) decision to calculate a merged dumping margin for FAG (U.K.) Limited and Barden Corporation (U.K.) Limited; and (3) commission of a clerical error in the Statistical Analysis Software program. The Court sustains Commerce as to all other issues raised herein. [Plaintiffs' motion is granted in part and denied in part; this case is remanded to Commerce.]

(Dated July 10, 1996)

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman, Andrew B. Schroth and *Mark E. Pardo)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey M. Telep);* of counsel: *Thomas H. Fine, Michelle Behaylo, David Ross* and *Stacy J. Ettinger* for defendant.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V)* for defendant-intervenor Federal-Corporation.

Stewart and Stewart (Terence P. Stewart, Wesley K. Caine, Geert De Prest and *Myron A. Brilliant)* for defendant-intervenor The Torrington Company.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, FAG Kugelfischer Georg Schafer KGaA, FAG Italia S.p.A., FAG (U.K.) Limited, Barden Corporation (U.K.) Limited, FAG Bearings Corporation and The Barden Corporation (collectively "FAG"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of administrative review entitled *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order ("Final Results"),* 58 Fed. Reg. 39,729 (1993), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom; Amendment to Final Results of Antidumping Duty Adminis-*

trative Reviews, 58 Fed. Reg. 42,288 (1993), *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France and the United Kingdom; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 58 Fed. Reg. 51,055 (1993), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Amendment to Final Results of Antidumping Duty Administrative Reviews,* 59 Fed. Reg. 9,469 (1994).

BACKGROUND

On May 15, 1989, Commerce issued antidumping orders covering antifriction bearings ("AFBs") (other than tapered roller bearings) from Germany. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany,* 54 Fed. Reg. 20,900 (1989).

On April 27, 1993, Commerce published the preliminary results of its administrative review of antidumping duty orders on AFBs (other than tapered roller bearings) and parts thereof from Japan, France, Germany, Italy, Romania, Singapore, Sweden, Thailand and the United Kingdom. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Preliminary Results of Antidumping Duty, Administrative Reviews and Partial Termination of Administrative Reviews,* 58 Fed. Reg. 25,616 (1993).

On July 26, 1993, Commerce published the Final Results at issue. *See Final Results,* 58 Fed. Reg. at 39,729. FAG now moves pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record alleging the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) basing assessment rate on calculated entered values rather than on actual entered values; (2) including sales of certain needle roller bearings in the final margin calculation for cylindrical roller bearing sales; (3) adding an eight percent profit amount as best information available ("BIA") to the actual cost of related party inputs; (4) calculating a merged dumping margin for FAG (U.K.) Limited and Barden Corporation (U.K.) Limited; (5) deducting U.S. direct selling expenses from exporter's sales price ("ESP") rather than adding them to foreign market value ("FMV"); and (6) committing a clerical error.

DISCUSSION

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quan-

tity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

1. *Calculation of Assessment Rate:*

In the Final Results, Commerce explained its methodology for calculating assessment rates as follows:

> For ESP sales (sampled and non-sampled), we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting percentage margin against the entered Customs values on each of that importer's entries under the relevant order during the review period. While the Department is aware that the entered value of sales during the period of review (POR) is not necessarily equal to the entered value of entries during the POR, use of entered value of sales as the basis of the assessment rate permits the Department to collect a reasonable approximation of the antidumping duties that would have been determined if the Department had reviewed those sales of merchandise actually entered during the POR.

Final Results, 58 Fed. Reg. at 39,732.

FAG objects to Commerce's methodology for calculating assessment rates arguing that Commerce should have divided the total dumping margins by the actual entered value of bearings imported during the period of review. According to FAG, Commerce's use of total entered value is inconsistent with the requirements of 19 U.S.C. § 1673e(a)(1) (1988) and may result in either the undercollection or overcollection of antidumping duties. Pls.' Mem. Supp. Mot. J. Agency R. at 11–19.

FAG raised this identical issue in a previous case before this Court regarding the second administrative review. This Court upheld Commerce's methodology as being consistent with law. *FAG Kugelfischer Georg Schafer KGaA v. United States,* 19 CIT ____, Slip Op. 95–158 (Sept. 14, 1995), *aff'd,* 1996 WL 267277 (Fed. Cir. 1996). The Court adheres to its prior decision and, therefore, finds Commerce's methodology to be supported by substantial evidence on the agency record and in accordance with law.

2. *Inclusion of Needle Roller Bearings:*

On December 23, 1991, Commerce made a determination in response to a scope ruling request submitted by FAG concerning certain needle bearings, holding that for purposes of the AFBs antidumping order, needle roller bearings with a length-to-diameter ratio of 4 to 1 or less were considered cylindrical roller bearings. *See Final Determination on the Request by FAG for Exclusion of Certain Engine Crank Shaft and Engine Main Shaft Pilot Bearings from the Scope of Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings and Parts Thereof From the Federal Republic of Germany ("Final Scope Determination"),* Gen. Issues P.R. Document No.

35, Exhibit 2. On September 2, 1992, Commerce sent a letter to FAG and other interested parties clarifying the scope ruling stating that the ratio of 4 to 1 is a dispositive ratio and the standard to be applied in all circumstances for distinguishing between needle roller bearings and cylindrical roller bearings. Gen. Issues P.R. Document No. 11, Fiche 3, Frame 10. As a result of the above decision, Commerce included within the scope of the determination at issue cylindrical roller bearings with a length-to-diameter ratio of 4 to 1 or less. *Final Results,* 58 Fed. Reg. at 39,785.

FAG disputes Commerce's decision to include these bearings within the scope of the order arguing that Commerce inappropriately applied a scope ruling retroactively. FAG insists that Commerce's retroactive application of the scope ruling violates principles of due process and equity because FAG could not have known at the time of the third period of review that the bearings at issue would be subject to the collection of antidumping duties. As such, FAG claims that Commerce deprived respondents of the opportunity to remedy market behavior in order to ease the impact of dumping duties. Pls.' Mem. Supp. Mot. J. Agency R. at 22–25.

FAG further claims that Commerce's decision to include the bearings within the scope of the review contravenes the statutory requirements for conducting an administrative review. *Id.* at 26 (referring to 19 U.S.C. § 1675(a)(2) (1988)). FAG argues that Commerce violated the statute by incorporating into the review proceedings entries which were already liquidated as non-scope merchandise. Pls.' Mem. Supp. Mot. J. Agency R. at 25–27.

In the alternative, FAG urges the Court to limit the application of the scope determination to sales involving the merchandise made after December 23, 1991. *Id.* at 28. FAG maintains that the Court should at least order Commerce to exclude the sales at issue from the calculation of FAG's ESP assessment rate because at the time of entry the bearings at issue were categorized by the United States Customs Service ("Customs") as non-scope merchandise. FAG concludes that "principles of equity and fairness require a prospective application of ITA's change in class or kind definition." *Id.* at 29.

Commerce responds that when it determined that bearings with a length-to-diameter ratio of 4 to 1 or less were properly classifiable as cylindrical roller bearings, it merely clarified that such bearings were actually within the order's scope. Commerce explains that the purpose of a scope determination is to clarify the coverage of an existing order. According to Commerce, it was required by the statute to review each entry of the subject merchandise that, even before the clarification, was always subject to the outstanding order. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 21–23 (referring to 19 U.S.C. § 1675(a)(2)). Commerce also emphasizes that the statute does not limit Commerce's review to unliquidated entries. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 24–25.

Commerce further maintains that FAG should have been on notice that Commerce might find bearings with a 4 to 1 or less length-to-diameter ratio to be within the scope of the order since FAG requested the scope review on August 8, 1990 (approximately nine months prior to the period of review). *Id.* at 25. Even if FAG did not have proper notice, Commerce points out that FAG could have reduced the impact of antidumping duties by refraining from selling the subject merchandise at less than fair value prices. *Id.*

Finally, Commerce rebuts FAG's alternative argument by stating that it is irrelevant that Customs' classification differs from Commerce's in determining whether Commerce may review sales of merchandise for purposes of assessing antidumping duties that Commerce finds are within the scope of an antidumping order. Commerce contends that a classification by Customs does not govern an antidumping determination regarding class or kind. *Id.* at 25–26.

Defendant-intervenor The Torrington Company ("Torrington") supports Commerce's decision to include the sales of cylindrical roller bearings in its assessment of antidumping duties where the roller length-to-diameter ratio was less than 4 to 1. Def.–Int. Torrington's Opp'n to Pls.' Mot. J. Agency R. at 14–16.

In rebuttal, FAG argues that Commerce's regulations clearly specify that a scope ruling affects only entries made on or after the date of the ruling. Pls.' Reply to Opp'n to Mot. J. Agency R. at 12 (citing 19 C.F.R. § 353.29 (1993)).

This Court has repeatedly held that Commerce has inherent authority to define the scope of an antidumping duty investigation. *NTN Bearing Corp. of Am. v. United States,* 14 CIT 623, 627, 747 F. Supp. 726, 731 (1990) (and cases cited therein). To determine whether a particular class or kind of foreign merchandise falls within the scope of an investigation, Commerce examines the description of the merchandise contained in the petition. *See Mitsubishi Elec. Corp. v. United States,* 12 CIT 1025, 1027, 700 F. Supp. 538, 541 (1988), *aff'd,* 898 F.2d 1577 (Fed. Cir. 1990). "The determination as to whether a product is covered by an antidumping investigation is one which the ITA must make with ample deference to the intent of the petition." *Torrington Co. v. United States,* 16 CIT 99, 105, 786 F. Supp. 1021, 1026 (1992) (citations omitted), *dismissed,* 16 CIT 861, 802 F. Supp. 453 (1992). Although Commerce has the authority to clarify the scope of an antidumping duty determination, Commerce may not alter the scope of a pre-existing order "in a way contrary to its terms." *Smith Corona Corp. v. United States,* 915 F.2d 683, 686 (Fed. Cir. 1990).

In light of the fact that Commerce is not permitted to alter the scope of a pre-existing order but, rather, only has the authority to clarify the scope of the order, FAG's contentions are without merit. By definition, a scope ruling is a determination intended to clarify the scope of a pre-ex-

isting order. *See* 19 C.F.R. § 353.29.[1] Once Commerce determines through a scope ruling that a particular product is indeed covered by the order, Commerce cannot exclude such merchandise from the order when determining the proper amount of antidumping duties. Section 1675(a)(2), Title 19, United States Code, requires Commerce to consider each entry subject to the order in its calculation of antidumping duties:

> For the purpose of [determining the amount of any antidumping duty], the administering authority shall determine—
>
> (A) the foreign market value and United States price of *each entry of merchandise subject to the antidumping duty order* and included within that determination, and
>
> (B) the amount, if any, by which the foreign market value of *each entry* exceeds the United States price of the entry.
>
> The administering authority * * * shall publish notice of the results of the determination of antidumping duties in the Federal Register, and *that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.*

(Emphasis added).

This Court has upheld Commerce's decision to include roller bearings with a length-to-diameter ratio of 4 to 1 within the scope of this antidumping order. *Koyo Seiko Co. v. United States,* 17 CIT 1076, 834 F. Supp. 1401 (1993), *aff'd,* 31 F.3d 1177 (Fed. Cir. 1994). FAG does not dispute the validity of the scope ruling itself and, therefore, claims that the decision in the *Koyo* case is irrelevant to the issue presented in this case. However, implicit in the decision in *Koyo* is that Commerce did not improperly expand the scope of the existing order by deciding to include roller bearings with a length-to-diameter ratio of 4 to 1 within the scope of the order. The logical conclusion is that the bearings at issue were always included within the scope of the order and Commerce's scope determination merely clarified that fact.

Further, once such a finding is made, it would be incongruous not to permit Commerce to assess antidumping duties on the basis of these bearings for all investigations conducted pursuant to the order. As Commerce notes, it cannot assess dumping duties against previously-liquidated merchandise, but it is required to include sales information for the liquidated merchandise that is within the scope of the order for purposes of calculating assessment rates for remaining unliquidated entries and cash deposits for future entries. Any other result would permit too large of a windfall for a respondent participating in an antidumping duty review.

The Court also rejects FAG's alternative argument that the sales at issue should only be included in the computation of the future deposit rate and should be excluded from the calculation of FAG's ESP assess-

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[1] 19 C.F.R. § 353.29 sets forth the regulations for scope determinations. If Commerce decides to conduct a scope inquiry, 19 C.F.R. § 353.29(d)(5) requires the Secretary to issue "a final ruling as to whether the product which is the subject of the scope inquiry is *included in the existing order,* including an explanation of the factual and legal conclusions on which the final ruling is based." (Emphasis added).

ment rate because FAG entered the merchandise according to the classification by Customs. While Customs' classification of particular merchandise is a consideration for Commerce in making a scope determination, it is not a dispositive factor. *See Smith Corona Corp.*, 915 F.2d at 687. This Court has noted that "[i]t is well-settled that a tariff classification by the Customs Service does not govern an antidumping determination regarding class or kind." *Torrington Co. v. United States,* 14 CIT 507, 512, 745 F. Supp. 718, 722 (1990) (citations omitted). The Court continued by stating: "It is the responsibility of ITA to interpret the term class or kind in such a way as to comply with the mandates of the antidumping laws, not the classification statutes." *Id.* at 512–13, 745 F. Supp. at 722. The Court further noted that "antidumping determinations 'may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules or may define or modify a known classification in a manner not contemplated or desired by the Customs Service.'" *Id.* at 513 n.7, 745 F. Supp. at 722 n.7 (citing *Royal Business Machines, Inc. v. United States,* 1 CIT 80, 87 n.18, 507 F. Supp. 1007, 1014 n.18 (1980), *aff'd,* 669 F.2d 692 (1982)). In light of this well-settled law, FAG's reliance on the Customs' classification was misplaced and, therefore, cannot support FAG's claim of unfairness. FAG's complaints concerning lack of notice are further undercut by its own request for a scope determination on August 8, 1990. *See Final Scope Determination,* Gen. Issues P.R. Document No. 35, Exhibit 2, at 1. This request demonstrates that FAG was aware that Customs' classification of the merchandise is not controlling and that Commerce may have had a different interpretation of the statute.

For the reasons explained above, the Court finds Commerce's decision to include within the scope of the Final Results cylindrical roller bearings with a length-to-diameter ratio of 4 to 1 or less to be supported by substantial evidence on the agency record and in accordance with law.

3. *Addition of Eight Percent Profit Amount:*

In the Final Results, Commerce added an eight percent profit amount as BIA to the actual cost of related party inputs when calculating constructed value for FAG Italia S.p.A. ("FAG-Italy"). *Final Results,* 58 Fed. Reg. at 39,755. FAG takes issue with Commerce's action claiming that FAG-Italy responded completely and accurately to the section of Commerce's questionnaire dealing with related party inputs. FAG explains that it provided cost of production data for related party inputs because no independent market existed for such inputs and, therefore, no fair market price existed with which to compare transfer prices. FAG further emphasizes that Commerce accepted FAG's cost of production data for purposes of the preliminary determination and never indicated any deficiencies in FAG's questionnaire response concerning related party inputs. Pls.' Mem. Supp. Mot. J. Agency R. at 30–35.

Commerce admits that its questionnaire was unclear as it appeared to give FAG-Italy the option of reporting either transfer prices or cost of production data. Commerce also concedes that it did not indicate any

deficiency in FAG-Italy's response. Consequently, Commerce requests a remand in order to remove the application of BIA from the valuation of FAG-Italy's inputs purchased from related parties. Commerce further states that it has not yet determined whether it is appropriate to use transfer prices if they are higher than cost of production and, therefore, requests a remand to decide this issue as well. Unsure of its reading of *Federal-Mogul Corp. v. United States,* 18 CIT ___, ___, 862 F. Supp. 384, 403–04 (1994), Commerce requests instruction from the Court as to the propriety of adding the minimum eight percent profit twice in the constructed value calculation—once on each related party input and a second time to the total cost of all inputs. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 29–31.

Defendant-intervenor Torrington asserts application of BIA was appropriate because both the statute and Commerce's questionnaire required FAG to report transfer prices for related party inputs. Torrington also supports Commerce's choice of BIA as being reasonable and consistent with the statute. Def.–Int. Torrington's Opp'n to Pls.' Mot. J. Agency R. at 19–24.

Defendant-intervenor Federal-Mogul Corporation ("Federal-Mogul") agrees with Torrington's position on this issue. Def.–Int. Federal-Mogul's Opp'n to Pls.' Mot. J. Agency R. at 13–18.

The relevant statutory provisions are as follows:

> **(e) Constructed value**
>
> **(1) Determination**
>
> For the purposes of this subtitle, the constructed value of imported merchandise shall be the sum of—
>
> **(A)** the cost of materials * * *
>
> **(B)** an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual commercial quantities and in the ordinary course of trade, except that—
>
> * * * * * * *
>
> **(ii)** the amount for profit shall not be less than 8 percent of the sum of such general expenses and cost;
>
> * * * * * * *
>
> **(2) Transactions disregarded; best evidence**
>
> For the purposes of this subsection, a transaction directly or indirectly between * * * [related parties] may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise under consideration. If a transaction is disregarded under the preceding sentence and there are no other transactions available for consideration, then the determination of the amount required to be considered shall be based on the best evidence available * * *.

> **(3) Special rule**
>
> If, regarding any transaction between * * * [related parties] involving the production by one of such persons of a major input to the merchandise under consideration, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the costs of production of such input, then the administering authority may determine the value of the major input on the best evidence available regarding such costs of production, if such costs are greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. § 1677b(e) (1988).

The Court addressed this issue in *SKF USA Inc. v. United States,* 19 CIT ___, ___, 888 F. Supp. 152, 155–57 (1995). *SKF* involved the questionnaire response of SKF USA Inc. and SKF GmbH (collectively "SKF") in the same administrative review as the one presently before the Court. The Court determined in *SKF* that Commerce inappropriately applied BIA because the questionnaire was ambiguous and Commerce failed to give any indication that SKF's response was deficient. The Court found that where respondents report cost of production instead of transfer prices, and where Commerce has no reasonable grounds to suspect that the value attributed to inputs is less than the cost of producing those inputs, there is no adjustment for profit required in the calculation of cost of production for inputs. *SKF,* 19 CIT at ___, 888 F. Supp. at 156 (citing 19 U.S.C. § 1677b(e)(2) & (3)). However, the Court found that in calculating constructed value for all of the subject merchandise pursuant to 19 U.S.C. § 1677b(e)(1), Commerce must make the necessary adjustment for profit (a minimum of eight percent). Finally, the Court did not discuss the issue of whether Commerce is required to prefer, when considering related party inputs, the transfer price if it is greater than the cost of production since Commerce's choice to rely on cost of production was in accordance with law. *SKF,* 19 CIT at ___, 888 F. Supp. at 156–57.

As the facts in the present case are identical to those in *SKF,* the Court remands this issue for removal of BIA from Commerce's constructed value calculation of related party inputs (its increase of FAG-Italy's value for inputs by a factor of eight percent for profit). Commerce is instructed not to change its profit adjustment to total constructed value made under 19 U.S.C. § 1677b(e)(1)(B)(ii). Finally, on remand, it is not necessary for Commerce to reconsider its decision to rely on cost of production as opposed to transfer prices as its choice in this case is consistent with law.

4. *Merged Dumping Margin:*

Commerce decided to collapse FAG (U.K.) Limited ("FAG-UK") and Barden Corporation (U.K.) Limited ("Barden") for purposes of calculating dumping margins in the Final Results. 58 Fed. Reg. at 39,773–74. FAG objects to Commerce's treatment of FAG-UK and Barden arguing that the two companies qualified for separate treatment. FAG empha-

sizes that on September 24, 1992, Commerce granted FAG's request to treat FAG-UK and Barden as separate companies for purposes of reporting sales and cost data. While FAG does not dispute the fact that the two companies are related, FAG maintains that Commerce has a practice of calculating separate dumping margins where companies operate as separate and distinct entities and where there is no substantial danger of price manipulation. FAG asserts that Commerce found these conditions to be met by FAG-UK and Barden in the September 24 letter, and that the facts on the record support this conclusion. Pls.' Mem. Supp. Mot. J. Agency R. at 37–41.

In support of its position, FAG insists that no commercial synergy existed between FAG-UK and Barden as Barden continued to operate in the same manner as it had prior to FAG's acquisition of Barden in December 1990. According to FAG, during the third period of review, Barden's day-to-day operations such as management, marketing, sales, distribution, and pricing remained separate and distinct from those of FAG-UK. FAG further argues that FAG-UK and Barden did not share common board members and that there is no evidence that the consolidation of financial statements between a subsidiary and a parent company results in price manipulation. *Id.* at 41–47.

Commerce counters with its concern that granting two related companies separate treatment creates an incentive to evade the dumping order by making U.S. sales through whichever company has a lower margin. In the Final Results, Commerce stated the following with respect to its decision to collapse the two companies:

> After fully considering the information on the record in this review, including FAG KGS's percentage ownership in its U.K. subsidiaries and the fact that the parent and sister companies share common board members, we determined that a strong possibility of prices and costs or production manipulation exists between the related companies.

58 Fed. Reg. at 39,774.

Commerce argues that its decision was consistent with its practice of collapsing related parties because the facts demonstrate that the relationship between the parties is such that there is a strong possibility of manipulation of prices and production decisions that would result in the circumvention of the antidumping law. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 32 (citing *Nihon Cement Co. v. United States*, 17 CIT 400, 425–27 (1993)). Commerce explains that its treatment of the related companies was different from the second period of review because the consolidation of the two companies was not complete until the third period of review. Def.'s Opp.'n to Pls.' Mot. J. Agency R. at 35–36

Commerce emphasizes that it considered the totality of the circumstances in determining whether to collapse related parties and that no one factor was dispositive. *Id.* at 33–34. Commerce states that its finding that FAG possesses 100 percent common ownership of its subsidiaries indicated a potential for price and production manipulation. While

Commerce recognizes that the consolidation of financial information may not automatically result in price manipulation, Commerce insists that it provided evidence of the potential for price manipulation. In further support of its position, Commerce maintains that the two companies shared board members and that the operations of FAG-UK and Barden were closely intertwined. *Id.* at 36–41.

Defendant-intervenor Federal-Mogul supports Commerce's position on this issue arguing that Commerce's initial decision to permit the two companies to report their information separately did not restrict Commerce's ability to merge the companies later. Federal-Mogul stresses that there was very little substantive information at the time of Commerce's initial decision not to collapse the companies, and that the facts that became apparent during the investigation required Commerce to change its position. Def.-Int. Federal-Mogul's Opp'n to Pls.' Mot. J. Agency R. at 19–20. Torrington also supports Commerce's decision to collapse the companies. Def.-Int. Torrington's Opp'n to Pls.' Mot. J. Agency R. at 28–30.

In general, Commerce does not collapse related parties except where there is a strong possibility of price manipulation. *See Nihon,* 17 CIT at 425; *see also Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Bearings) and Parts Thereof from the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 19,089 (1989). As explained by the court in *Nihon,* Commerce relies on a variety of factors in determining whether to collapse entities:

> In determining whether to collapse entities, Commerce does not focus solely upon the degree of voting control one company may have over another, but upon a broad analysis of the facts in the case* * * . Other factors relied upon by Commerce in collapsing related companies are that (1) the companies are closely intertwined; (2) transactions take place between the companies; (3) the companies have similar types of production equipment, such that it could be unnecessary to retool either plant's facilities before implementing a decision to restructure either company's manufacturing priorities; and (4) the companies involved are capable, through their sales and production operations, of manipulating prices or affecting production decisions.

17 CIT at 425 (citations omitted). The court further noted that "[a]ll of these factors need not be present as long as the parties are sufficiently related to present the possibility of price manipulation." *Id.* at 425–26 (citing *Cellular Mobile Telephones and Subassemblies from Japan; Final Results of Antidumping Duty Administrative Review,* 54 Fed. Reg. 48,011, 48,015 (1989)). The court concluded in *Nihon* that Commerce's decision to collapse several companies was not supported by substantial evidence because Commerce had failed to consider any of the above factors. The court stated that "[w]hile each of these criteria did not have to be met, Commerce did have to consider them all." *Id.* at 426.

Commerce cited the following evidence in support of its decision to merge the dumping margins of FAG-UK and Barden:

> Because Barden and FAG-UK have a sister relationship rather than a parent-subsidiary relationship, we examined the relationship of the parent corporation (FAG-Germany) *vis-a-vis* its subsidiaries in assessing the capability of manipulating prices and costs, and affecting production decisions. FAG-UK and Barden are wholly owned by the same parent. We consider this degree of ownership to be a strong indicator of FAG-Germany's potential to control FAG-UK's and Barden's production and pricing decisions. Furthermore, the financial information of the two respondents is consolidated in FAG-Germany's financial statement. Such consolidation constitutes additional evidence that the companies are closely intertwined and have a financial relationship.
>
> The record shows that Barden and FAG-UK share board members with each other and with FAG-Germany who serve important managerial functions. The sharing of board members by two related companies, particularly members with management responsibilities, is evidence that the companies are closely intertwined. It also indicates the capability of FAG-Germany to manipulate prices or affect production decisions regarding the two respondents.
>
> We note that FAG-UK stated in its supplemental response to Section A of the questionnaire that "at times FAG-Germany may direct certain marketing and sales strategies for its European affiliates or make upper-level administrative and management decisions which pertain directly or indirectly to FAG-UK (to this end, FAG-UK's board of directors consists of FAG-UK as well as FAG-Germany personnel)." In addition, FAG-UK explains in its Section A response that the "FAG Bearings Group is composed of an integrated network of full-line producers, exporters and importers, using a worldwide rationalized production system." In its 1990 Annual Report, FAG KGS describes its acquisition of The Barden Corporation as one that "will produce synergies in development and distribution." These statements illustrate FAG-Germany's potential, if not actual, influence over the sales and production activities of its subsidiaries and support the September 18 decision to collapse FAG UK and Barden UK.

58 Fed. Reg. at 39,773–74 (citations omitted). From the above, it seems that Commerce only considered two of the factors listed in *Nihon*—whether the companies were intertwined and the possibility of manipulation. There is no evidence that Commerce determined either that transactions occurred between the companies or that the companies had similar production equipment. Even the factors Commerce did consider were addressed in a superficial manner. Commerce focused on "potential" rather than "actual" influence that FAG may assert over its subsidiaries. This potential for influence absent consideration of other factors is not enough to create a strong possibility of price manipulation. Further, in *Nihon,* the court found that ownership interest and the overlapping of board members was not enough to create "one of those 'rela-

tively unusual situations, where the type and degree of relationship is so significant that we find there is a strong possibility of price manipulation.'" *Nihon,* 17 CIT at 426–27 (citing *Final Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Bearings) and Parts Thereof from the Federal Republic of Germany,* 54 Fed. Reg. at 19,089).

The Court has also conducted an independent examination of the record, and has not located substantial evidence supporting Commerce's position. In fact, the record contains evidence directly contradicting Commerce's conclusions in the final determination. For example, FAG's supplemental questionnaire response contains the following description of the relationship between FAG-UK and Barden:

> FAG UK and Barden UK act entirely independent of one another; they do not engage in any commercial relations and are related only through corporate familial ties via a common parent. During the third POR, Barden did not sell any bearings made by FAG, and FAG did not sell any bearings made by Barden (in either the U.S. or U.K. markets). Neither influences the other's pricing or marketing strategies, each carries distinct and non-fungible product lines, and each maintains separate billing, accounting and financial records. This was verified by the Department in the second POR and may again be verified in the current POR.

FAG-UK's Response to the DOC Supplemental Questionnaire, U.K. P.R. Document No. 126, Fiche 67–68, Frame 3. In the Final Results, Commerce did not address the day-to-day operations of the companies but, rather, focused on broad concepts concerning FAG's ownership of Barden. In so doing, Commerce failed to address in any manner the above description of the relationship between the two companies.

In addition, in the letter dated September 24, 1992, Commerce granted FAG's request to permit FAG-UK and Barden to submit separate questionnaires stating the following:

> We are basing our decision on the facts presented in your August 20, 1992 letter:
>
> - that Barden and FAG-UK are each separately owned by FAG Kugelfischer Georg Schafer KGaA (FAG-Germany), and do not have ownership in each other;
> - that their product lines are in no way fungible or interchangeable and are produced by different manufacturers;
> - that their pricing structures are separate and independent;
> - that neither sold each other's bearings.
>
> From this information, it appears that Barden and FAG-UK are distinct entities and that there is no substantial danger of price manipulation.

U.K. P.R. Document No. 53, Fiche 42, Frame 16. In the Final Results, Commerce glossed over the contents of this letter by stating the following:

> We recognize that, when respondents were filing questionnaire responses for the third review, we allowed separate reporting by

> FAG-UK and Barden. We did so because the two companies indicated that their record-keeping systems were separate and not easily merged for purposes of responding to the questionnaire. However, our decision to allow separate reporting does not preclude our collapsing the two companies in calculating dumping margins.

58 Fed. Reg. at 39,774. While separate reporting may not preclude collapsing the two companies for the purpose of calculating dumping margins, Commerce made no attempt to refute its own conclusion that the two companies were separate and distinct entities and that there was no substantial danger of price manipulation. The scant evidence cited by Commerce in the Final Results was not enough to demonstrate that its original conclusions were incorrect and that a substantial danger of price manipulation indeed existed. Commerce also failed to note that its comments in the September 24 letter tend to demonstrate that two of the criteria in *Nihon* were not satisfied. First, Commerce's statement concerning the products produced by the companies indicates that the companies do not have similar types of production equipment. Second, Commerce's acknowledgment of the independent activities of the companies indicates that few if any transactions occurred between the companies. Commerce did not address either of these factors in the Final Results.

As such, the Court finds that the record does not support Commerce's decision to collapse FAG-UK and Barden. This issue is remanded so that Commerce may calculate separate margins for FAG-UK and Barden.

5. *U.S. Direct Selling Expenses:*

FAG objects to Commerce's decision to deduct direct selling expenses from ESP rather than adding such expenses to FMV. Pls.' Mem. Supp. Mot. J. Agency R. at 47–49. As Commerce points out, subsequent to FAG's filing of its brief, the Court of Appeals for the Federal Circuit ("CAFC") vindicated Commerce's practice. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 41–44 (citing *Koyo Seiko Co. v. United States,* 36 F.3d 1565 (Fed. Cir. 1994)). FAG did not address this issue in its reply brief.

In upholding Commerce's practice of deducting direct selling expenses from ESP, the CAFC stated the following:

> Nothing in the plain language or the legislative history of the Antidumping Act precludes Commerce's approach of adjusting exporter's sales price by deducting therefrom certain direct selling expenses incurred in the United States. Indeed, Commerce's stated rationale for its approach is well within the bounds of reasonableness.

Koyo, 36 F.3d at 1575. In light of the decision of the CAFC, the Court sustains Commerce on this issue.

6. *Clerical Error:*

FAG claims that Commerce committed a clerical error in its Statistical Analysis Software ("SAS") computer program resulting in the merging of sales and cost data bases and the application of a BIA rate to

certain U.S. sales where no constructed values were found. FAG points out that on September 17, 1993, this Court ordered that the same error be corrected with respect to FAG-Italy. FAG now requests a remand so that this error may be corrected with respect to FAG-UK. Pls.' Mem. Supp. Mot. J. Agency R. at 50–53. Commerce agrees that a remand is appropriate so that Commerce may correct the SAS programming error. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 44.

The Court agrees with the parties that a clerical error occurred and, therefore, remands this issue to Commerce to correct the SAS programming error so that appropriate matches are made between sales and cost data.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to: (1) recalculate constructed value for FAG-Italy without applying BIA to the actual cost of related party inputs; (2) calculate separate dumping margins for FAG-UK and Barden; and (3) correct the error in the SAS computer program. Commerce is sustained on all other issues.

Remand results are due within ninety (90) days of the date this opinion is entered. Any comments or responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

(Slip Op. 96–109)

CLUB DISTRIBUTION, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–08–00475

[Plaintiff's motion for summary judgment is granted; defendant's cross-motion for summary judgment is denied. Judgment entered for plaintiff.]

(Dated July 10, 1996)

Law Offices of Michael P. Maxwell, (Michael P. Maxwell, Edith Sanchez Shea) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Amy M. Rubin)*; Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Karen P. Binder),* of Counsel, for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* This matter comes before the Court on cross-motions for summary judgment. The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

Club Distribution, Inc. ("Club") brought the underlying action to challenge the United States Customs Service's ("Customs") tariff classification of an item known as "Christmas Carollers." The parties do not dispute that the item is a carriage, approximately one foot in length, carrying four human figures. The carriage has a metal frame and a wooden body, and it is decorated with holly and bows. The human figures have plastic faces and are dressed in Victorian-style clothing made of papier-mache. The figures are attached to the carriage and cannot be removed. They are holding wrapped and unwrapped gifts, a bag full of presents, and are apparently singing. The unwrapped gifts include a candy cane and a small fir tree.

The merchandise entered the United States in 1993. Customs classified it under subheading 9502.10.40 of the Harmonized Tariff System of the United States ("HTSUS"), as "dolls representing only human beings * * * other," and imposed a duty of 12% *ad valorem*. Club argues that the merchandise is properly classified as other articles for Christmas festivities under subheading 9505.10.50, HTSUS, which carries a duty of 5.8% *ad valorem*. Alternatively, Club contends that the item should be classified as a "statuette" either of plastic under subheading 3926.40.00, HTSUS, of wood under subheading 4420.10.00, HTSUS, or of base metal, under subheading 8306.29.00, HTSUS.

DISCUSSION

When faced with a motion for summary judgment, the Court determines whether a case presents any genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–8 (1986). If a case presents no such issues, and a moving party is entitled to a judgment as a matter of law, then the Court may grant summary judgment. USCIT Rule 56(d). In making the determination as to the proper classification of the merchandise under the HTSUS, the Court must consider whether Customs' classification is correct, both independently and in comparison with the importer's proposed alternative. *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984).

Since this matter is before the Court on cross-motions for summary judgment, and it presents no genuine issues of material fact in dispute, granting summary judgment is appropriate.

A. CUSTOM'S CLASSIFICATION

In making its cross-motion for summary judgment, Customs claims that the subject imports should be classified as "dolls representing only human beings and parts and accessories thereof * * * other," under subheading 9502.10.40, HTSUS. Customs argues that this classification is correct because the human figures in the carriage are dolls. Customs further argues that although the item consists of more than just dolls, it is the dolls that give the item its essential character. Therefore, according to Customs, the item as a whole should be classified under the provision for dolls.

The common and commercial meaning of the term "doll" is broad. Dolls are representations of humans, in either realistic or caricature form. Explanatory Notes, 95.02. Dolls can be made out of the same materials as the imports at issue: plastics, fabric, ceramics, wood, and papier-mache. *Id.* Dolls also have many uses, one of which is ornamentation. *Id.; Russ Berrie & Co. v. United States,* 76 Cust. Ct. 218, 223, 417 F. Supp. 1035, 1039 (1976) (citations omitted).

Given the broad definition of the tariff classification for dolls, the Court finds that the human figures in the carriage may be described as "dolls." This does not, however, mean that the entire item must be classified as a doll. In this regard, the Court notes that the human figures cannot be detached; the item should be considered as a unit. Even if the Court were to assume that the human figures define the essential character of the merchandise, as asserted by defendant, the Court must nevertheless classify the item under the heading that provides the most specific description of the merchandise. General Rules of Interpretation 3(a), HTSUS. If the item answers to a description which more clearly identifies it as a whole, then that description describes it more specifically than one that identifies only an ancillary part of the item. *Mitsubishi Electronics America, Inc. v. United States,* ___ CIT ___, Slip Op. 95–47 (March 16, 1995).

B. Club's Argument That the Merchandise Should be Classified as Articles for Christmas Festivities

The Court next considers whether the subject merchandise can be described more specifically by any of the provisions proposed by Club. In its motion for summary judgment, Club argues that the item should be classified as an article for Christmas festivities under 9505.10.50, HTSUS.

An item may be classified as an article for Christmas festivities if its primary purpose is to adorn the home or a Christmas tree during the Christmas season. *See Midwest of Canon Falls, Inc. v. United States,* ___ CIT ___, Slip Op. 96–19 (January 18, 1996). Items that sit, stand or hang may all be articles for Christmas festivities. *Id.* Additionally, items of both traditional and non-traditional design may be classified as articles for Christmas festivities. *Id.*

Customs argues that the subject merchandise cannot fall within the scope of Club's proposed heading because it is made of durable materials. This argument is based on the Explanatory Notes to heading 9505, which state that items falling within the heading are items "which in view of their intended use are generally made of non-durable material." Explanatory Notes, 95.05(A). The Court does not need to decide whether durability is a requirement. The subject merchandise is primarily made of materials that are explicitly covered by heading 9505, HTSUS: paper, wood, and plastic. *Id.; see also,* 9505.10.15 and 9505.10.40, HTSUS. The metal components of the carriage are minimal. Merchandise primarily made of materials explicitly enumerated under heading 9505, HTSUS, cannot be excluded from that heading.

The Court finds that the subject merchandise falls within the scope of the tariff provision for articles for Christmas festivities. The Court bases its determination primarily on the general physical characteristics of the merchandise and the manner in which it is advertised.

The general physical characteristics of the subject merchandise include its motif in a Christmas theme. The carriage holds a fir tree, candy canes, and wrapped gifts. It is decorated with wreaths and bows. The item is named and advertised as "Christmas Carollers."

The tariff provision for articles for Christmas festivities clearly identifies the item as a whole. In contrast, the provision for dolls identifies only parts of the item. Consequently, the Court finds that the merchandise is more specifically described as an article for Christmas festivities under 9505.10.50, HTSUS.

C. Club's Argument That the Merchandise Should be Classified as Statuettes

The Court now considers whether the merchandise is more specifically described as a statuette of base metal, plastic, or wood, rather than as an article for Christmas festivities. The Court finds that the merchandise cannot be classified under any of the classifications for statuettes.

The merchandise cannot be described accurately as a statuette or other ornament of base metal under subheading 8306.29.00, HTSUS. First, the merchandise's only metal components are the wheels and the frame holding the carriage. The Court has held that merchandise covered by Heading 9505 can also possibly be classified as a statuette or ornament of base metal. *Midwest of Canon Falls, Inc. v. United States,* ____ CIT ____, Slip Op. 96–19 at 19–21 (January 18, 1996). However, in that case, the entire item was made of metal. *Id.* In contrast, the merchandise at issue here is primarily composed of materials other than metal.

Second, even if the Christmas Carollers could be classified as either a statuette or as an ornament of base metal, subheading 9505.10.50, HTSUS, covering articles associated with Christmas provides a more specific description of the subject merchandise. Subheading 9505.10.50 better describes the item as a whole with regard to all of its component materials. In addition, this subheading accurately identifies the motif of the merchandise.

A similar analysis applies to Club's other proposed classifications: statuettes and other ornamental articles of plastic under subheading 3926.40.00, HTSUS; and statuettes and other ornamental articles of wood under subheading 4420.10.00, HTSUS. Wood or plastic alone accounts for only a minor part of the merchandise. The human figures and toys are mostly composed of papier-mache; the carriage is mostly made of wood and metal. Again, the subheading for Christmas articles better describes the item when viewed as a whole, both with respect to the variety of its component materials and its motif.

CONCLUSION

For all of the foregoing reasons, the Court finds that the subject item is correctly classified as an article for Christmas festivities, under subheading 9505.10.50, HTSUS. Consequently, it is hereby

ORDERED that plaintiff's motion for summary judgment is GRANTED; and it is further

ORDERED that defendant's motion for summary judgment is DENIED. Judgment will be entered accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/61 6/25/96 Musgrave, J.	Prime Tanning Co., Inc.	95–03–00284	4104.10.20 5.5%	4104.31.50 5.0%	Agreed statement of facts	Laredo Leather imported from Mexico
C96/62 6/25/96 Musgrave, J.	Prime Tanning Co., Inc.	95–07–00875	4104.31.50 5.0%	4104.31.50 Duty free	Agreed statement of facts	Laredo Leather imported from Mexico
C96/63 6/26/96 Musgrave, J.	Asanté Technologies, Inc.	93–02–00071	8715.82.0080–3 4.7%	8417.99.1500, 8417.99.1500–8 Duty free	Agreed statement of facts	San Francisco LAN boards
C96/64 6/26/96 Musgrave, J.	Asanté Technologies, Inc.	92–07–00479	8715.82.0080–3 4.7%	8417.99.1500, 8417.99.1500–8 Duty free	Agreed statement of facts	San Francisco LAN boards
C96/65 7/5/96 Goldberg, J.	Algoma Steel Corp.	89–10–00592, 90–10–00541	7208.44.00CA, 7208.90.00CA 4.9% and 1.4%, 5% and 1.5% depending on the year of entry as products of Canada etc.	7326.19.00B Duty free	Motor Wheel Corp. *v.* United States Slip Op. 95–49 (March 20, 1995) Court No. 90–10–00549	Sault Ste. Marie Solid steel circle blanks
C96/66 7/5/96 Tsoucalas, J.	Brechteen Company	93–10–00714	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States Slip Op. 95–110 (June 14, 1995) Court No. 93–02–00074	Chicago Artificial fibrous sausage casings
C96/67 7/9/96 Carman, J.	Takashima U.S.A., Inc.	93–01–00052	355.82 Duty at the rate in effect at the time of entry	771.43 Dutiable at the rate in effect on the date of entry	Agreed statement of facts	Not stated [W]oven or knit fabrics

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